Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1999

DIANE SANK,
Petitioner,
v.
NEW JERSEY, ET AL,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, an unsuccessful candidate for the office of municipal councilperson in the 1997 and 1998 Republican Primary Elections, contested the elections and appealed the decisions of the two trial courts. Upon appeal the two cases were consolidated by the New Jersey appellate court which affirmed the trial courts decisions. In 1997 the Primary ended in a tie vote (150 to 150 votes cast) and pursuant to *N.J.S.A.* 19:13-20, seven members of the Republican County Committee, unanimously elected Petitioner's opponent, Ramon Ferro, as the party candidate for the General Election. In 1998, Petitioner lost the Primary Election by a mere 13 votes, despite the fact that again (as in 1997), the Chairman of the County Republican Party removed her from the preferred Column One position that she had won in a blind drawing pursuant to *N.J.S.A.* 19:23-24, took away her designated slogan that she was entitled place under her name on the ballot under *N.J.S.A.* 19:23-18, and publicly endorsed her opponent prior to the Primary, contra to *N.J.S.A.* 19:34-52, thus giving rise to and presenting the following repetitive questions which continue to evade review:

1) *An issue of first impression:* Whether the state statute *N.J.S.A.* 19:13-20 which mandates that the members of a political party's organization break a tie vote in a Primary Election, rather than the party's registered voters in a runoff election, is an unconstitutional violation of the "one man, one vote" doctrine?

2) *An issue of first impression:* Whether the taking of the Column One Position and the Party Slogan, which were property rights granted pursuant to *N.J.S.A.* 19:23-18 and 19:23-24, is a violation of due process and equal protection rights and the Taking Clause of the Fifth and Fourteenth Amendments.

QUESTIONS PRESENTED (continued)

3) Whether endorsement of a candidate prior to a Primary Election is an unconstitutional exercise of the powers of the County Clerk and the County Republican Party Chairman in violation of Petitioner's due process and equal protection rights under the Fifth and Fourteenth Amendments.

4) *An issue of first impression:* Whether the registered voters of a political party have a right to choose the candidates who will represent their party in a General Election via a Primary Election or whether that right belongs to a political party's hierarchy.

5) *An issue of first impression:* Whether *N.J.S.A.* 19:49-2 is constitutionally flawed by its lack of procedural due process and equal protection safeguards inasmuch as it allows one person to determine who will represent the party in a Primary Election and create a suspect class of second class party candidates.

LIST OF PARTIES

This Petition arises from the denial of certification by the New Jersey Supreme Court. Said denial was without written opinion on the merits of the issues presented. Petitioner is the same as in the caption. All parties, who are the Respondents, are as follows:

Respondants in both 1997 and 1998 cases:

The State of New Jersey;

Kathleen A. Donovan, in her official capacity as Clerk of the County of Bergen;

The Office of the County Clerk of Bergen County;

Henry Shotmeyer, in his official capacity as Chairman of the Bergen County Republican Organization;

The Office of the Chairman of the Bergen County Republican Organization; and

Angelo R. Mungioli, as Chair of the Republican (Municipal) County Committee of Englewood Cliffs.

Respondants in 1997 case only:

James Bancroft, as Republican Primary Candidate for Office of Council in Englewood Cliffs;

Ramon Ferro, as Republican Primary Candidate for Office of Council in Englewood Cliffs;

Gerald A. Calabrese, in his official capacity as Chairman of the Bergen County Democratic Organization;

The Office of the Chairman of the Bergen County Democratic Organization.

LIST OF PARTIES (continued)

Jerome Kasoff, as Democratic Primary Candidate for Office of Council in Englewood Cliffs;

Joseph Cioffi, Jr., as Democratic Primary Candidate for Office of Council in Englewood Cliffs; and

Sara Murray, as Chair of the Democratic (Municipal) County Committee of Englewood Cliffs.

Respondants in 1998 case only:

Roger Wasik, as Republican Primary Candidate for Office of Council in Englewood Cliffs;

Nurhan Helvacian, as Republican Primary Candidate for Office of Council in Englewood Cliffs;

Thomas Manolio, as Democratic Primary Candidate for Office of Council in Englewood Cliffs;

Ilan Plawker, as Democratic Primary Candidate for Office of Council in Englewood Cliffs; and

John Doe and/or Jane Doe I through X (Where X being a number at present unknown).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the New Jersey Supreme Court judgment dated March 8, 2000. (Appendix A at 1a).

OPINIONS AND ORDERS BELOW

In 1997 and 1998, Petitioner lost election contest suits. which the trial courts opined failed to state causes of action. (Appendices G 30a to 36a and F at 14a to 29a). On October 6, 1999, Petitioner was denied relief by the New Jersey appellate court in an opinion which joined her election contest suits. (Appendix B 2a to 8a). She was subsequently denied certification without opinion by the New Jersey Supreme Court on March 8 2000, giving rise to this Petition. (Appendix A at 1a).

To summarize the procedural history of the two cases, on August 18, 1997, following a flurry of futile motions, Petitioner, acting *pro se*, timely filed her appeal in the 1997 election contest case. She was without the resources to pursue accelerated process.

On June 8, 1998, immediately following her defeat in the 1998 Primary Election, Petitioner attempted accelerated process and emergent relief. She was denied without opinions by both the appellate court on August 19, 1998, the New Jersey Supreme Court on September 2, 1998 and this Court on February 22. 1999. (Appendices B at 2a to 8a; D at 11a; and A at 1a, respectively). When she was denied a Writ of Certiorari, Petitioner timely filed for a regular appeal at the state level.

STATEMENT OF JURISDICTION

The jurisdiction of this court rests and is invoked under 28 *U.S.C.* §1257(a). This Petition for Certiorari arises from a denial of certification by the New Jersey Supreme Court, the highest court of the state.

This Petition presents claims wherein the Petitioner was denied rights and privileges guaranteed by the Constitution of the United States, and in addition, was injured by state statutes that are constitutional on their face but unconstitutional as applied, as well as a statute that is unconstitutional on its face.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the *United States Constitution* states:

> No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment of the *United States Constitution* states:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Article I, section 2 of the *New Jersey Constitution* states:

> All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.

4. New Jersey State Statutes:

N.J.S.A. 19:1-1 is set forth in Appendix H at 37a.

N.J.S.A. 19:13-20 is set forth in Appendix N at 46a.

N.J.S.A. 19:23-18 is set forth in Appendix J at 39a.

N.J.S.A. 19:23-24 is set forth in Appendix at K at 40a.

N.J.S.A. 19:34-52 is set forth in Appendix L at 43a.

N.J.S.A. 19:49-2 is set forth in Appendix M at 44a.

5. New Jersey State Law:

The Open Public Meetings Act (Sunshine Law) (N.J.S. 10:4-6 et seq.) is set forth in Appendix O at 51a.

STATEMENT OF THE CASE

This Petition challenges the fundamental fairness of election procedures practiced in the State of New Jersey in Primary Elections. It presents questions of general public importance that have not been, but should be settled by this Court. These same questions arise in one form or another every year, in election after election across this state and others,[1] to the continuing injuries of candidates similarly situated to the Petitioner herein and to voters at large. Furthermore, until these questions are resolved by this Court, Petitioner will continue to be irreparably injured by the denial of procedurally fair Primary Elections and discriminatory Primary ballots. Most importantly, voters will be disenfranchished when they are denied a runoff election to break tie votes when a handful of party organization members are mandated by statute to break the tie during a secret meeting closed to the public. Until this Court resolves these issues, Petitioner is denied the equal protection of the law, deprived of her right of political association, stripped of property, and denied notice, a forum to protect her rights, and any form of redress.

Current election laws in New Jersey encourage voter apathy and discourage qualified candidates from running for office as a result of unfair election practices. At issue is whether the registered voters of a political party have a right to choose candidates who will represent their party in a General Election via a Primary Election or does that right belong to a political party hierarchy.

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[1] Petitioner was denied the column and slogan in 1997, 1998, and in 2000. She ran in an uncontested Primary in 1999. She has previously served on the Englewood Cliffs council for a collective ten years.

A. 1997 Primary Election

The issues presented by these two cases are well defined in the trial transcripts. In 1997, the Petitioner ran for the municipal office of Council person in the Republican Primary and the election ended in a tie vote. The Petitioner received 150 votes as did her opponent, Ramon Ferro. The tie vote was broken by seven men who were members of the Republican County Committee for the municipality of Englewood Cliffs. The Chairman of the tie-breaking committee was the campaign manager for the Petitioner's opponents. Ramon Ferro was a also member of this committee but abstained from voting for himself. His running mate, however, who was also on the committee, made the vote unanimous.

On April 10, 1997, the Petitioner and her running mate filed a "bracketed" Nominating Petition for the Englewood Cliffs Primary Election indicating their designated slogan, "Republican for Responsible Government" to be placed under their names on the sample ballot that would be sent to all registered Republican voters prior to the Primary and on the election machine ballots on election day. Their opponents designated a different slogan on their Nominating Petition. Since the Petitioner and her running mate were first to file, they were entitled to the slogan of their choice pursuant to *N.J.S.A.* 19:23-18.

On April 17, 1997, pursuant to *N.J.S.A.* 19:23-24, the Municipal Clerk of Englewood Cliffs, held a blind drawing to determine the column position on the primary ballot for the four Republican candidates running for the two council seats. Petitioner won the preferred Column One Position. It should be noted that this column is commonly called the "Organizational" or "Party" Column because, regardless of a drawing for position, the Respondent Bergen County Clerk

who is responsible for typesetting the ballots pursuant to *N.J.S.A.* 19:49-2, invariably ignored the blind drawings and gave the preferential column to the Republican Party's County Committee Chairman who was also the campaign manager for the slate of county candidates (freeholders, county clerk,[2] sheriff, etc.).

Following the drawing, Respondent Henry Shotmeyer, the Chairman of the Bergen County Republican Committee (hereinafter called the "Party Chairman"), notified Respondent Kathleen A. Donovon, the Clerk of Bergen County (hereinafter called the "County Clerk"), that he did not wish Petitioner to be placed in column one with the county slate and he did not want the Petitioner to have the slogan "Republicans for Responsible Government." It should be noted that there is no law in New Jersey giving the Party the column one position as of right. Furthermore, there is no law that bestows to the Party a property right to the slogan "Republicans for Responsible Government."

In a letter dated April 21, 1997, the Bergen County Clerk advised the Petitioner and her running mate, that "in accordance with N.J.S.A. 19:49-2, you will not be in the Organizational Column in the June 3, 1997 Primary Election" and that the Petitioner and her running mate would have to choose another slogan.

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[2] Respondent County Clerk was an incumbent candidate in the 1997 primary election and part of the county slate which appointed Respondent County Committee Chairman to the position of county campaign manager. She ran in the preferred column one position with the party designation. Although an attorney and an officer of the court, she ignored the holding of *Millman v. Kelly*, 171 *N.J. Super.* 589 (1979), which prohibited a County Clerk from using the sample Primary ballot and the actual ballot as an advertisement of incumbency. She is the only candidate on the ballot mentioned *three times* by name.

On June 8, 1997, five days after the primary election the Municipal County Committee members of Englewood Cliffs met pursuant to *N.J.S.A.* 19:13-20 for the sole purpose of filling the "vacancy" created by the tie vote. The meeting was closed to the public and the Petitioner was not noticed or invited to attend. The meeting was chaired by Respondent Angelo R. Mungioli who was also the campaign chairman for the Bancroft/Ferro slate. The Petitioner's opponent, Ramon Ferro, was present as a member of the Municipal County Committee. Needless to say, he was elected unanimously to fill the "vacancy."

On June 13, 1997, the plaintiff filed suit and the trial began on August 14, 1997, but regardless of the Constitutional prohibitions and the New Jersey statutes that were violated, the Trial Court dismissed the Petitioner's complaint for failure to prove a cause of action.

B. 1998 Primary Election

Petitioner lost the 1998 primary by 13 votes and again brought suit challenging the same unfair election practices (with the exception of the "vacancy" statute). During the trial the Respondents admitted to violating various election laws, including *N.J.S.A.* 19:23-18, *N.J.S.A.* 19:23-24, and *N.J.S.A.* 19:34-52. Respondents justified their actions by relying upon language of *N.J.S.A.* 19:49-2, *Eu et al. v. San Francisco County Democratic Central Committee, et al.*, 489 *U.S.* 214 (1989) and *Quaremba v. Allan*, 67 *N.J.* 1 (1975). They also argued that none of their actions fell within the purview of the New Jersey Open Public Meetings Act, *N.J.S.A.* 10:4-6, et seq., and that the case presented no constitutional issues.

During the trial the Party Chairman also testified that prior to the Primary the countywide membership of the

County Committee met to fulfill the mandates of their By-Laws, i.e. to select and vote on who would be placed on the Republican Primary Ballot for offices of County Superintendent, Sheriff, County Clerk, and Freeholder. Respondent read into the record pertinent sections of the By-Laws which required the Committee to endorse Republican candidates prior to the Primary Election. The By-Laws also provided for the selection and endorsement of all Republican candidates for office, including those at the municipal level.

The Municipal Clerk of Englewood Cliffs testified that pursuant to *N.J.S.A.* 19:23-18, Petitioner and her running mate submitted the first bracketed nominating petition for the offices of council which designated "Republicans for Responsible Government" as the slogan they wished on the Primary Ballot. Petitioner's opponents, Roger Wasik and Nurhan Helvacian, requested the same slogan but filed second and had to chose a different slogan. When the Clerk advised them of this fact, they designated "Republicans for a Two Party System" as their slogan.

The Municipal Clerk then held a blind drawing for column positions on the municipal Primary Ballot, pursuant to *N.J.S.A.* 19:23-24, which the Petitioner and her running mate won.

The sequence of events that followed was identical to the 1997 primary election process. Acting in concert, the Party Chairman and the County Clerk removed the Petitioner and her running mate from column one and stripped her of the slogan, forcing her to choose another. She filed a suit which was dismissed for failure to state a cause of action.

C. The Appeal and Petition for Certification

Although Petitioner filed a timely appellate brief in the

1997 matter and sought but was denied emergent relief in the 1998 case, the 1997 case languished in appellate limbo while the court waited to join the 1998 case in a single decision. On October 6, 1999, the appellate court issued a scant four page consolidated opinion in which they dismissed the Petitioner's claims as "moot." (Appendix B at 2a to 8a).

In the decision the appellate court chided the Petitioner for failing to seek emergent relief in 1997 but saw no problem with the fact that they denied emergent relief in 1998 on almost an identical set of facts. The court held that the complaints were untimely filed and should have been filed *before* the primary elections, not after them -- with a single exception as to the constitutional claim concerning *N.J.S.A.* 19:13-20 which was, of course, by the time they heard the appeal, moot also. Furthermore, since the claims did not meet the standards of cases involving "issues of great public importance," the court decided to wait for the issues to be presented in a "live controversy." (Appendix B at 8a).

On March 8, 2000 Petitioner was denied certification without opinion, giving rise to this Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

INTRODUCTORY ARGUMENT RELEVANT TO ALL POINTS

The history of legislation and caselaw governing the Primary Election process in the State of New Jersey is germane to the issues before this court because it illustrates the political and philosophical chasm between the organized political party organizations and candidates who, for whatever reason, have not achieved notice or approval of their party.

In *Stevenson v. Gilfert*, 13 *N.J.* 496 (1953), the New Jersey Supreme Court observed that the Primary Election

system was adopted so that members of the party, rather than party bosses, could choose candidates to represent the party in the General Election. *Stevenson* cited to *Ray v. Blair*, 343 *U.S.* 214, 216 (1952), which observed that:

> . . . political parties were not born with the Republic but were created by necessity; that originally nominees for public office were designated by self-appointed individuals; that this system was early succeeded by party conventions; and that because of public dissatisfaction with the political manipulation of conventions they have been largely superseded by direct party primaries.

Petitioner submits to this Court that the above cases have relevance for the instant case, inasmuch as all of the injuries which have occurred are nothing more or less than an organized political party and its hierarchy extending their control over the individual candidates and the Primary Election process itself. Each violation of election law in the instant case sought to turn back the clock to a time in history when the party bosses reigned supreme. In the above cited cases, the courts duly noted that the *members*, not the party hierarchy, should decide who will represent the party in a Primary Election. Undoubtedly this is the reason that the New Jersey Legislature enacted *N.J.S.A.* 19:1-1 which defines a "primary election" and *N.J.S.A.* 19:34-52 which forbids member(s) of a County Committee from endorsing candidates prior to the primary.

As stated in *Motley v. Halpern*, *267 N.J. Super.* 325 (Law Div. 1993):

> Primary elections are governed by statute. *N.J.S.A.* 19:1-1 defines a 'primary election' as 'the procedure whereby the *members o.f a*

> *political party* . . . nominate candidates to be voted for at General Elections . . . .' [Furthermore] the primary represents the first step of our two stage election system, the process by which *members of a political party* select that party's candidates for the General Election.

But more importantly, the Petitioner submits, the Primary Election is also ". . . the major avenue of access to the General Election ballot by which *the party membership* determines which candidates it chooses to present to the electorate in that General Election." *Primary Elections: The Real Party in Interest*, 27 *Rutgers L. Rev.* 298, 305 (1974). (emphasis added).

Petitioner submits to this Court that Respondents seek to reintroduce a patronage system which controls the Primary Election by limiting it to select few individuals in contradiction to the constitutional guarantees of due process and equal protection.

Over the past half-century political scientists and statisticians have proven time and time again that ballot position and special designations (including slogans) give candidates a 5 to 61% statistical advantage. Position and designations serve as cues for the "donkey" voter, i.e., the uninformed party voter who has no opinion about the qualifications of candidates and consequently votes the first column on the ballot. *The Effect of the "Donkey Vote" on the House of Representatives*, 10 *Aus. J. of Pol. and History*, 221, 225 (1964; *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, *45 S. Calif. L. Rev.*, 365 (1972). See also *Kautenburger v. Jackson*, 333 *P.2d* 293, 295 (1958) which the court took judicial notice that "it is commonly known and an accepted fact that where there are a number of candidates for the same office, the names appearing

at the head of the list (on the ballot) have a distinct advantage."

The following statistics published by the State of New Jersey, Department of Law and Public Safety, Division of Elections, dramatically illustrate the overwhelming and growing apathy of New Jersey Primary Elections voters which coincides with implementation of *N.J.S.A.* 19:49-2, showing the percentage of registered voters that actually voted in a particular election.

Year	Primary Election	General Election
1992	22.4%	82.5%
1993	19.0%	65.0%
1994	13.0%	55.0%
1995	9.9%	38.0%
1996	13.5%	72.0%
1997	13.8%	55.6%
1998	8.0%	42.0%
1999	6.0%	31.0%

Petitioner requests this court to reinfranchise New Jersey voters by crafting a judicial remedy that will restore a level playing field to all candidates, one that will restore voter confidence in the electoral process and vanquish growing voter apathy.

POINT I ALTHOUGH THIS PETITION RAISES QUESTIONS OF GREAT IMPORTANCE TO VOTERS AND CANDIDATES FOR POLITICAL OFFICE INASMUCH AS THEY INVOLVE THE INTEGRITY OF THE PRIMARY ELECTION PROCESS, THEY CONTINUE TO EVADE REVIEW.

In the appellate opinion below, the court citing *McGlynn v. New Jersey Pub. Board*, 88 *N.J.* 113, 121 (1981), noted that "although this court may decide moot controversies where

issues of great public importance are presented," the court did not consider the issues herein sufficiently important for resolution. (Appendix B at 2a to 8a). That court expressed the opinion that some of the issues raised herein had been adequately addressed by New Jersey courts but failed to say just which issues had been resolved. As to the other issues which had not been resolved, the court stated "Resolution of the other issues . . . can wait until they are adequately presented in a live controversy." (Appendix B at 8a).

The Petitioner submits to this Court that the integrity of the election process is more than the cornerstone of our democratic form of government -- it is the bedrock upon which our democracy rests. It is a uniquely American process which insures government "by the people and for the people." As such, issues surrounding its integrity demand resolution. It defies logic that such issues could be labeled "not of great public importance."

Although some of the questions presented in this case could possibly be characterized as "moot" insofar as the General Elections are over and the time has passed that the Petitioner could serve a meaningful term in office, the Petitioner and other candidates continue to be injured by the onerous application of the rules and statutes complained of herein.[3] They are repetitious and yet continue to evade review. Furthermore, inasmuch as the New Jersey courts refuse to settle these meritorious issues, Petitioner submits that they will continue to evade review until this Court takes action.

Petitioner relies upon this Court's ruling in *Morse et al. v. Republican Party of Virginia*, 517 *U.S.* 186 (1996). In that

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[3] As Petitioner posts this Petition on the New Jersey Primary Election Eve, she does so knowing that she has again been removed from the column one position by the Respondents, a fact that reinforces that the injuries complained of herein continue and yet evade review.

case the Court took note that "Like other cases challenging electoral practices, *** this controversy is not moot because it is 'capable of repetition, yet evading review.'" Citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

ISSUE II *N.J.S.A.* 19:13-20 IS A VIOLATION OF THE CONSTITUTIONAL PRINCIPAL OF ONE MAN, ONE VOTE AND THE NEW JERSEY CONSTITUTION'S CAVEAT THAT "THE POWER IS INHERENT IN THE PEOPLE." ART. I, SECTION. 2.

A "primary election," by definition, is an election whereby the registered voters of a party vote to elect the candidates that they desire to represent their party in the subsequent General Election. It is the constitutional right of these individual voters to cast their votes for whom they wish to head their party's ticket. It is not the right of the party's hierarchy or its party bosses who are empowered to make these choices for the registered voters.

Petitioner submits to this Court that *N.J.S.A.* 19:13-20 is unconstitutional on its face. It denies voters their constitutional right to franchise. Furthermore, this statute as applied to the Petitioner, denied her right to a fair and impartial primary election contest. *N.J.S.A.* 19:13-20 governs the procedure for filling a bogus "vacancy" created by a tie vote in the primary election. It states in pertinent part:

> In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the General Election, *or in the event of inability to select a candidate because of a tie*

vote at such primary, a candidate shall be selected in the following manner:

> a. (4) In the case of an office to be filled by the voters of a portion of a single county, the candidate shall be selected by those members of the county committee of the party wherein the vacancy has occurred who represent those portions of the county which are comprised in the district from which the candidate is to be elected. (emphasis added).

In 1997, defying overwhelming opposition by the Party, inasmuch as the Respondent Party Chairman endorsed the Petitioner's opposition and stripped the Petitioner of slogan and column, the Petitioner ran a dead heat with the party's chosen candidate, Ramon Ferro. But instead of a runoff election to break the tie, the choice of who would run on the Republican ticket was taken from the registered voters and given by statute to seven members of Englewood Cliffs Municipal Republican County Committee.

When the Petitioner filed suit, the trial judge stated that *N.J.S.A.* 19:13-20 was constitutional. The New Jersey courts refused to reach the merits of the Petitioner's claim. (Appendix G 30a to 36a).

The Petitioner submits that the Right of Suffrage is a constitutional right that forms the underpinnings of the democratic form of government enjoyed by each and every citizen of these United States. It is a right that heretofore has been jealously guarded by the judiciary. It is a right that men and women have lived for and died for. The right to vote is a personal right. It can not be delegated, made an object of proxy, and it can not be legally usurped by legislative fiat or color of law. In the instant case, the Petitioner argues that *N.J.S.A.* 19:13-20 usurps the registered voters' right of

franchise and unconstitutionally delegates that right to the members of the Municipal County Committee, the party's local or municipal hierarchy.

The instant case is analogous to reapportionment cases where geographically larger areas controlled elections to the detriment of more populated areas, where one vote could defeat ten votes in another county. *Baker v. Carr*, 369 *U.S.* 186 (1962); *Gray v. Sanders*, 372 *U.S.* 368 (1962). In the instant case, seven votes of a municipal county committee was held greater than the 300 votes cast in equal proportion for Ferro and the Petitioner in 1997. Thusly 300 voters were disenfranchised.

In the instant case, the Petitioner was irreparably injured by the application of *N.J.S.A.* 19:13-20, a statute that is unconstitutional on its face. Not only was the Petitioner's political reputation as a winning candidate damaged, but she was unfairly deprived of the opportunity to represent the Englewood Cliffs Republican voters as their council candidate when the seven members of the municipal Republican County Committee elected Ramon Ferro as the Republican candidate to run in the General Election. She was deprived of time, money, and energy in a primary race for Republican council candidacy that was unfair from the beginning. Furthermore, not only was the Petitioner injured, the registered Republican voters of Englewood Cliffs were denied the right to choose the candidate who would be their chosen standard bearer in the General Election.

In the landmark case, *Gray v. Saunders, supra,* the Supreme Court of the United States held that the right to suffrage is inviolate. It cannot be the object of legislative proxy. Only individual voters have the right to vote. That right cannot not be given to any other entity, with one exception: the electoral college, a body expressly provided for in the United

State Constitution which casts the final votes for President.

In conclusion, Petitioner asks this Court, in its wisdom, to craft a remedy to right the wrong perpetuated by this onerous statute and to halt the carnage now, rather than as suggested by the appellate court below, wait for a "live controversy."

POINT III *N.J.S.A.* 19:49-2 IS UNCONSTITUTIONAL AS WRITTEN AND APPLIED, AND THE STATE FAILED TO DEMONSTRATE A COMPELLING INTEREST TO UPHOLD THE CONSTITUTIONAL VALIDITY OF THIS STATUTE THAT WEAKENS THE PARTY ORGANIZATION RATHER THAN STRENGTHENS IT.

The Petitioner lost the 1998 primary by 13 votes and tied in the 1997 primary. She submits to this Court that she lost because *N.J.S.A.* 19:49-2 gave unfair advantage to her opponents. Furthermore the State advanced no compelling interest to withstand the "strict scrutiny" test warranted by this onerous statute. *Anderson v. Celebrezze*, 460 *U.S.* 780 (1983); *Bullock v. Carter*, 405 *U.S.* 134, 142-143 (1972).

N.J.S.A. 19:49-2 was designed to give the political parties' hierarchy the power to dictate who will be party candidates in primary elections -- thus promoting a party patronage system. It is in direct opposition to the legislative intent of New Jersey election laws which is recited in *N.J.S.A.* 19:1, i.e., a primary election is defined as "the procedure whereby the *members of a political party* . . . nominate candidates to be voted for at general elections . . . ." (emphasis added).

The Petitioner submits *N.J.S.A.* 19:49-2 is discrimin-

atory.[4] It gives one individual in each county, i.e., the county campaign manager, uninhibited power to create first and second-class Republican and Democrat candidates by giving first class candidates the column one, preferred position and the party slogan, "Republicans for Responsible Government." In most counties, such as Bergen County where these cases originated, the power of the Party Chairman is reinforced when he dons a second hat of county campaign chairman.[5] The statute renders the second-class candidates powerless since they are not provided a hearing or forum in which to challenge or debate their classification.

The Petitioner submits that by its application, this statute becomes the political party's tool of exclusion rather than inclusion and disassociation rather than association. Simply put, second-class candidates are denied their right to associate with Republicans who in fact could be of like philosophy. Furthermore, the sample ballot which is controlled by the campaign manager is sent to every registered voter and

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[4] "When ballot designations are meaningful in content and evenhanded in application, the advantage accruing to any candidate is . . . no more unfair than is the election system itself . . . It is when designations are bestowed selectively . . . that the sense of fair play is justifiably outraged. Such designations are discriminatory . . . ." Kelman, Ballot Designation: Their Nature, Function, and Constitutionality, 12 Wayne L. Rev. 756, 772 (1966).

[5] See *N.J.S.A.* 19:34-52 in Appendix L at 41a, which prohibits a political party's county committee from endorsing candidates prior to a primary election, and *Cavanagh v. Morris*, 121 *N.J. Super.* 430 (1972), a case which is on all-fours with the instant case wherein the court looked at the by-laws of the party organization and held that the county committee (or party) chairman who also wore the county campaign manager's hat, was, in fact, the alter ego of the county committee chairman, and as such violated N.J.S.A. 19:34-52 which prohibits a party's county committee from endorsing candidates prior to a primary election.

becomes nothing more or less than a political flyer, paid for by the taxpayers, and used by county campaign managers to announce their endorsements of anointed candidates. The sample ballot and voting machines, brand all candidates that are not hand-picked by the campaign managers as second-class Republicans.

N.J.S.A. 19:49-2 deprives candidates of valuable property in the form of column position and designation as a first class Republican without due process and in violation of the Fourteenth Amendment. It is a "position-biased" and "designation-biased" statute which gives candidates who have the ear of the county campaign manager an unfair advantage in the Primary Election. It gives absolute power to one person, the county campaign manager, who then decides who will represent the party in a Primary Election. His power includes the power to classify everyone from a national presidential candidate down to a small town municipal council candidate.[6] The campaign manager is not responsible to a constituency. He is not voted into power. He is appointed by the county committee candidates who have yet to be elected to public office. Even so, the county campaign manager decides who is fit to be called a "Republican for Responsible Government," i.e. a true Republican, one that is selected and endorsed by the Republican Party. He is given complete control over the primary election ballots -- subject only to the discretionary power given to the County Clerk who formats the primary

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[6] The statute also allows the county campaign manager, i.e. the county committee chairman, to create an organization of loyal, beholding county committee members to perpetuate his reign, inasmuch as the county committee chairman also has the power to grant the preferred column one position and the party slogan to candidates for county committee membership and pack the committee with his hand-picked followers!

ballot layout for the printers and programmers of the voting machines. In the instant cases, she followed the dictates of the campaign manager/party chairman and removed all second-class candidates from column one and stripped them of their slogan. She acted in fact as the agent of the party rather than a duly elected public officer.

The Petitioner submits to this Court that *N.J.S.A.* 19:49-2 affects voter's rights. The voters have the right to expect their party to lead rather than mislead. There is no question that voters presume that the party endorsement is predicated upon the campaign manager's knowledge of the candidates' qualifications and political philosophy -- when in fact, no hearing or forum is available to a candidate to present this information and no attempt is made by the campaign manager to gather it. *N.J.S.A.* 19:49-2 does not mandate a forum for the second-class candidate to dispute his or her classification.

In New Jersey, the party's county campaign manager has two opportunities to announce his endorsements. The first opportunity comes when every registered voter is sent a "sample ballot" in the mail. The second opportunity comes of course when the voter enters the voting machine booth and is cued by the machine ballot to vote for the party's choices.

The Petitioner therefore submits that this statute that affects the rights of the candidates and voters alike is therefore the proper subject of the "strict scrutiny" standard.

The Petitioner advances three constitutional arguments:

A. Procedural Due Process

The trial records are clear: the County Clerk and County Party Chairman admitted that they met privately at the County Clerk's office and repositioned the Petitioner and running mate in a different column and forced them to choose a

different slogan. Their actions were taken arbitrarily and under color of *N.J.S.A.* 19:49-2, an unconstitutional statute that is without procedural safeguards to insure the due process rights of candidates.

At trial the Petitioner argued that their closed meeting was in violation of New Jersey's Open Public Meeting Act, the State's Sunshine law, but her argument fell on deaf ears. (Appendix O at 51a to 59a). She argued that the actions of the County Clerk and Party Chairman was a denial of due process to no avail.

The Fourteenth Amendment mandates that no state shall deprive any person of life, liberty or property without due process of law. A denial of procedural due process requires three elements: 1) that State action must burden a protected right. *Parratt v. Taylor*, 451 *U.S.* 527 (1981); 2) the right must be deprived without a fair hearing either because a claimant did not receive adequate notice, *Mullane v. Central Hanover Bank & Trust Co.*, 339 *U.S.* 306 (1950), or a reasonable opportunity to be heard. *Wolff v. McDonnell*, 418 *U.S.* 539 (1974).

B. Equal Protection Issue

The Petitioner contends that *N.J.S.A.* 19:49-2 allows a "campaign manager" to create a classification of candidates for a Primary Election which neither serves a compelling state interest nor is rationally related to a legitimate state interest.

At a minimum, the equal protection clause's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws" requires that a statutory classification be rationally related to a legitimate state interest." *Mills v. Habluetzel*, 456 *U.S.* 91, 99 (1982). The highest level of scrutiny, that is, strict scrutiny, is employed

when a statute burdens personal, fundamental rights protected by the Constitution. *Cleburne v. Cleburne Living Center, Inc.*, 473 *U.S.* 432 (1985).

The Petitioner argues that a heightened level of scrutiny should be applied in the instant case because *N.J.S.A.* 19:49-2 burdens her fundamental right of association and the fundamental right to her property. Furthermore she is a member of a "insidiously silent and unwritten" classification that merits the heightened scrutiny of this Court.

By imposing silent and unwritten restrictions on the election process, the County Committee Chairman denied the Englewood Cliffs Republican voters the opportunity to establish their own standards for their representatives through the power of the ballot box.[7] The Petitioner submits to this Court that such restrictions and its concomitant effect on representative government do not rationally relate to any State compelling interest.

The Petitioner submits to this Court that it is clear that any restriction on a candidate's access to political party association decreases a voter's choice and consequently harms democratic government. Furthermore an analysis of equal protection dictates that any candidacy promoted or denied without procedural due process by a statute which permits a taking of property without a fair hearing or forum, is inimical to democratic government.

C. Right of Association Issue

The Petitioner and her running mate are Republicans. When filing their "bracketed" petition they chose to run as Republicans on the Republican Primary ballot. They chose to

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[7] N.J. Constitution, Article I, Section. 2, All political power is inherent in the people. (Appendix I at 38a).

run with the designation/slogan "Republicans for Responsible Government" on the ballot. Petitioner submits to this Court, that the rejection of her nominating petition as submitted, was due to a silent set of rules or an agenda known only to the Party Chairman. As a result she was denied political association on the ballot and to access to Republicans who ran under the same slogan.

The right of political association derives from the First Amendment rights of freedom of speech, petition for redress of grievances and peaceable assembly. *Cousins v. Wigoda*, 419 *U.S.* 477 (1975). "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 *U.S.* 51, 56-57 (1973). Petitioner submits that the right to associate, in the instant case is a candidate's right as well as a party's right and in the instant case her right as a candidate was denied without a forum.

The Court has recognized that ballot access restrictions may burden both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Illinois State Board of Elections v. Socialist Workers Party*, 440 *U.S.* 173, 184 (1979). However, not all restrictions on candidate eligibility "impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson v. Celebrezze*, 460 *U.S.* 780 788 (1983). The Court has upheld *evenhanded* restrictions. *American Party of Texas v. White*, 415 *U.S.* 767 (1974); *Jenness v. Fortson*, 403 *U.S.* 431 (1971). Petitioner submits that the application of N.J.S.A. 49:-2 is *underhanded* and fundamentally unfair.

When election rules present unreasonable barriers, the

Court has found constitutionally suspect burdens on the right of association. The Petitioner claims that her burden is "constitutionally suspect" because the County Committee Chairman designated her as a member of a class which cannot participate in the closed door meetings of the County Committee which discriminate against a class of candidates that are not already involved in County Committee actions when they become candidates for political office.

In conclusion, the Petitioner submits that *N.J.S.A.* 19:49-2 perverts the very essence of the Federal Constitution. It allows the government that was created "by people and for the people" to evolve into one that is politically controlled *by the party hierarchy for the party hierarchy.*

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: June 6, 2000

APPENDICES

APPENDIX A

SUPREME COURT OF NEW JERSEY
C-729 September Term 1999
48,755

DIANE SANK<
Plaintiff-Petitioner,

v.

THE STATE OF NEW JERSEY, et al.,

and

KATHLEEN A. DONOVAN, et al.,
Defendants-Respondents.

ON
PETITION
FOR CERTIFICATION

FILED
MAR 08 2000
/s/ Stephen W. Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-609-97 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 7th day of March, 2000.

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-609-97T3
A-7309-97T5

FILING DATE
APPELLATE DIVISION
OCT 6 1999
/s/ Emile R. Cox
Clerk

DIANE SANK,

Plaintiff-Appellant,

v.

THE STATE OF NEW JERSEY; KATHLEEN A.DONOVAN, in her official capacity as Clerk of the County of Bergen; THE OFFICE OF THE COUNTY CLERK OF BERGEN COUNTY; HENRY SHOTMEYER, in his official capacity as Chairman of the Bergen County Republican Organization; THE OFFICE OF THE CHAIRMAN OF THE BERGEN COUNTY REPUBLICAN ORGANIZATION; RAMON FERRO, as Republican Primary Candidate for Office of Council in Englewood Cliffs; JAMES BANCROFT, as Republican primary Candidate for Office of Council in Englewood Cliffs; ANGELO R. MUNGIOLI, as Chair of the Republican (Municipal) . "County Committee" of Englewood Cliffs; GERALD A. CALABRESE, in his official capacity as Chairman of the Bergen County Democratic Organization; THE OFFICE OF THE CHAIRMAN OF THE BERGEN COUNTY DEMOCRATIC ORGANIZATION; JEROME KASOFF, as Democratic Primary Candidate for Office of Council in Englewood Cliffs; JOSEPH CIOFFI,

JR., as Democratic primary Candidate for Office of Council in Englewood Cliffs; SARA MURRAY, as Chair of the Democratic (Municipal) "County Committee" of Englewood CliffS,

Defendants-Respondents .

[p. 1]

DIANE SANK,

Plaintif f-Appellant,

THE STATE OF NEW JERSEY; KATHLEEN A. DONOVAN, in her official capacity as Clerk of the County of Bergen;
THE OFFICE OF THE COUNTY CLERK OF BERGEN COUNTY;
HENRY SHOTMEYER, in his official capacity as Chairman of the Bergen County Republican Organization; and
THE OFFICE OF THE CHAIRMAN OF THE BERGEN COUNTY REPUBLICAN ORGANIZATION,

Defendants~Respondents,

and

ANGELO R. MUNGIOLI, as Chair of (Municipal) "County Committee" of Englewood Cliffs;
ROGER WASIK, as Republican Primary Candidate for Office of Council inEnglewood Cliffs;
NURHAN HELVACIAN, as Republican Primary Candidate forOffice of Council in Englewood Cliffs;
THOMAS MANOLIO, as Democratic Primary Candidate for Office of Council in Englewood Cliff s;
ILAN PLAWKER, as Democratic Primary Candidate for Office of Council in Englewood Cliffs,

Defendants .

Submitted September 22, 1999 - Decided OCT 6 1999

Before Judges Skillman, D'Annunzio and Fall.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

Diane Sank, appellant pro se.

John J. Farmer, Jr., Attorney General, attorney for respondent State of New Jersey

[p. 2]

in A-609-97T3 (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Susan C. Berger, Deputy Attorney General, on the brief) .

Carbone and Faasse, attorneys for respondent Kathleen A. Donovan, in her official capacity as Clerk of the County of Bergen and the Office of the County Clerk of Bergen County (John M. Carbone, on the brief in A-609-97T3). No brief was filed in A~7309-97T5.

Sinisi & Sproviero, attorneys for respondent Henry Shotmeyer in his official capacity as Chairman of the Bergen County Republican Organization and the Office of the Chairman of the Bergen County Republican Organization in A-609-97T3 and A-7309-97T5 (Stephen P. Sinisi and Renu A. Shevade, on the brief).

Ramon Ferro, respondent pro se in A-609-97T3 has not filed a brief.

James Bancroft, respondent pro se in A-609-97T3 has not filed a brief.

Angelo R. Mungioli, respondent pro se in A609-97T3 has not filed a brief.

Herten, Burstein, Sheridan, Cevasco, Bottinelli & Litt, attorneys for respondent Gerald A. Calabrese in A-609-97T3 have not filed a brief.

Breslin & Breslin, attorneys for respondents Jerome Kasof f, Joseph Cioffi, Jr. and Sara Murray in A-609-97T3 have not filed a brief.

PER CURIAM

Plaintiff, an unsuccessful candidate for the Republican nomination for Councilperson in the City of Englewood Cliffs in 1997 and 1998, has filed appeals from final judgments which dismissed her complaints challenging the nominations of other

[p. 3]

persons as the Republican candidates in each of those years. We consolidate the appeals, and dismiss them as moot.

Plaintiff's first action was filed on June 13, 1997. The complaint alleged that plaintiff tied with another candidate for the second largest number of votes in the Republican primary election for Councilperson in Englewood Cliffs held on June 3, 1997, but that the other candidate had been nominated as the second Republican candidate by vote of the members of the Republican County Committee representing Englewood Cliffs. Plaintiff claimed that N.J.S.A. 19:13-20, the statute pursuant to which this vote was conducted, is unconstitutional. The complaint also alleged that plaintiff had been improperly denied the opportunity to run on the "organization line" and that the Republican Party County Chairman had improperly endorsed other candidates in the

primary election. Plaintiff's complaint demanded that the court enter an order requiring a "runoff primary election."

After an evidentiary hearing, the trial court issued an oral opinion on August 14, 1997, rejecting all of plaintiff's claims, and on that same day entered a final judgment dismissing her complaint. More than a month later, on September 18, 1997, plaintiff filed a notice of appeal from the judgment. Plaintiff failed to file any motion for emergent relief or acceleration, and the appeal has proceeded in the ordinary course.

[p. 4]

Plaintiff's second action was filed on June 8, 1998. The complaint alleged that plaintiff had been improperly excluded from the Republican organization line on the ballot for the primary election for Councilperson in Englewood Cliffs held on June 2, 1998, in which plaintiff had failed to obtain sufficient votes to be one of the Republican nominees. plaintiff also alleged that her name had been improperly placed in column two rather than column one of the ballot and that the County Chairman of the Republican Party had improperly endorsed other candidates. In addition, plaintiff claimed that N.J.S.A. 19:49-2, which regulates the positioning on the lines of a voting machine of the names of candidates for nomination at a primary election, is unconstitutional, and that defendants had violated the Open Public Meetings Act. Plaintiff f sought an order voiding the results of the election and requiring a new primary election to be held.

After a three-day trial, the trial court issued an oral opinion on July 23, 1998, rejecting plaintiff's claims. On July 30, 1998, the court entered a final judgment memorializing this ruling. On August 10, 1998, plaintiff filed a notice of appeal, and on August 12, 1998, she moved for

acceleration of the appeal. We denied this motion by an order entered on August 19, 1998.

It is firmly established that any challenge to the ballot in a primary or general election ordinarily must be brought before the election. See, e.g., Two Guys from Harrison, Inc. v. Furman,

[p. 5]

32 N.J. 199, 233 (1960).; In re Alleged Error in the Preparation of the Ballot for Recall Election in City of Hackensack, 31 N.J. 592, 596 (1960). The reason for this rule is that "[e]lections are solemn events of tremendous public significance" that should not be "voided for an irregularity in the ballot" except in extraordinary circumstances. Two Guys from Harrison, Inc. v. Furman, supra, 32 N.J. at 233.

Plaintiff's second action related solely to the form of the ballot for a primary election which had been held six days before she filed her complaint, and the only relief she sought was an order requiring a new primary. This action could and should have been brought before the primary election. Therefore, the trial court should have dismissed the complaint as untimely, and because plaintiff would not be entitled to any relief with respect to the results of the 1998 election even if one or more of her arguments were meritorious, the appeal is moot. Ibid.

Plaintiff's first action asserted not only claims of ballot irregularity in the primary election, but also a claim that N.J.S.A. 19:13-20, under which members of the Republican County Committee select the party's nominee in the event of a tie vote, is unconstitutional. Insofar as plaintiff's first action alleged irregularities in the primary ballot, it was untimely for

the same reasons as her second action. The first action was timely insofar as it challenged the procedures used to select the Republican Party's nominee after the tie vote in the primary, and

[p. 6]

the trial court properly considered the merits of this part of plaintiff's complaint. However, plaintiff failed to seek accelerated appellate review which would have enabled this court to review the matter before the ballots for the general election were prepared. As a result, the General election has now been held and the successful candidates have been sworn into office. Therefore, the appeal has become moot. See In re Hackensack Recall Election, supra, 31 N.J. at 596; Szamek v. Secretary of State, 130 N.J. Super. 333 (App. Div. 1974).

Although this court may decide moot controversies where issues of great public importance are presented, McGlynn v. New Jersey Pub. Broad. Auth., 88 N.J. 112, 121 (1981), we see no reason to invoke this power in the present case. Many of the issues plaintiff raises have been adequately addressed in prior cases. See, e.g., Catania v. Haberle, 123 N.J. 438 (1991); Quaremba v. Allan, 67 N.J. 1 (1975). Resolution of the other issues she raises can wait until they are adequately presented in a live controversy. See Szamek v. Secretary of State, supra, 130 N.J. Super. at 336.

Accordingly, the appeals are dismissed as moot.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.
/s/ Emile R. Cox
Clerk

APPENDIX C

SUPREME COURT OF THE UNTIED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 22, 1999

Ms. Diane Sank
173 Chalotte Place
Englewood Cliffs, N.J. 07632

Re: Diane Sank
v. New Jersey, et al.
No. 98-1129

Dear Ms. Sank:

The Court today entered the following order in the above titled case:

The petition for a writ of certiorari is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT OF
NEW JERSEY

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

APPENDIX D

SUPREME COURT OF NEW JERSEY
M-1613 September Term 1997
46,669

DIANE SANK,

Plaintiff-Movant,

v.

STATE OF NEW JERSEY, et al.,

Defendants-Respondents.

ORDER
(Filed
Sep.02, 1998)

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 2nd day of September, 1998.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

/s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

APPENDIX E

ORDER ON EMERGENT APPLICATION

A-7309-97T5

DIANE SANK,
Plaintiff-Appellant,
-v-
THE STATE OF NEW JERSEY, ET AL.
Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-7309-97T5
MOTION NO. M-8163-97
BEFORE PART: T
JUDGE(S): Long
Steinberg

EMERGENT APPLICATION FILED: 9/12/08 BY DR. DIANE SANK

ANSWER(S) FILED: 8/13/98 BY SUSAN C. BERGER, ESQ.
8/14/98 BY JOHN CARBONE, ESQ.
8/14/98 BY STEPHEN SINISI, ESQ.

REPLY ANSWER FILED: 8/81/98 BY DR. DIANE SANK

ORDER

(Filed 19, 1998)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 19 DAY OF August, 1998, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION	GRANTED	DENIED	OTHER
	( )	(X)	( )

MOTION TO ACCELERATE AND FURTHER RELIEF SUPPLEMENTAL:

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/S/ Emile R. Cox
Clerk

FOR THE COURT

/w/ Virginia Long
VIRGINIA LONG, P.J.A.D.

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
BERGEN COUNTY
DOCKET NO. BER-L-5355-98-5576-97
APP. DIV. NO._____

DIANE SANK,	)	
	)	
Plaintiff,	)	
vs.	)	TRANSCRIPT
	)	of
STATE OF NEW JERSEY,	)	TRIAL
et al,	)	
	)	
Defendant.	)	

Place: Bergen County
Justice Center
10 Main St. Room 314
Hackensack, NJ 07601

Date: July 23, 1998

BEFORE:

HONORABLE JAMES T. MURPHY, J.S.C.

TRANSCRIPT ORDERED BY:

DIANE SANK (173 Charlotte Place, Englewood, New Jersey 07632)

Transcriber Denise Sacca
ELITE TRANSCRIPTS, INC.
28 Catherine Street
Bloomingdale, N.J. 07403.
(973) 283-0196
Audio Recorded
Operator, E. Fryburger

[p. 1]

APPEARANCES:

DIANE SANK, PRO SE
Plaintiff

JOHN M. CARBONE, ESQ. (Carbone & Faasse)
Attorney for Defendant, Kathleen A. Donovan

STEPHEN SINISI, ESQ. (Sinisi, Van Dam, Sproviero & Sokolich)
Attorney for the Defendant, Henry Shotmeyer

JOHN L. MOLINELLI, ESQ. (Herten, Burstein, Sheridan, Cevasco, Bottinelli & Litt, Attorney for the Defendant, Gerald A. Calabrese

[p. 1]

The Court - Decision

THE COURT: This is the SANK matter. Docket No. L-5355-98. Appearances, please.

MS. SANK: Oh. Diane Sank, pro se, Your Honor.

MR. SINISI: Steven Sinisi, Sinisi & Sproviero, for the defendant, Henry Shotmeyer.

MR. CARBONE: John M. Carbone, Carbone & Faasse, Ridgewood, New Jersey, on behalf of the Bergen County Clerk, Your Honor, Kathleen Donovan.

(Unrelated Court matter discussed) THE COURT: This is the decision in the matter

of DIANE SANK V. THE STATE OF NEW JERSEY, et al. Docket No. L-5355-98.

The decision may be somewhat unartful. The closing arguments finished sometime yesterday afternoon, and I told the attorneys and Ms. Sank to come back this morning. I expected I would have a decision. I saw no purpose in

reserving decision, as it is necessary to get a decision out as quickly as is possible, considering that I will be on vacation for the month of August, and ballots have to be prepared, I believe, sometime in September.

1) The plaintiff, Diane Sank, filed this "verified complaint in lieu of prerogative writs" after - strike that, against Kathleen Donovan as Bergen

[p. 4J

County Clerk, and against the Office of Bergen County Clerk, and against Henry Shotmeyer in his capacity as Chairman of the Bergen County Republican Organization (BCRO), and the Office of the Chairman of the Bergen County Republican Organization challenging the validity of the plaintiff's placement on the ballot in the republican municipal primary election held on June 2nd, 1998, and the denial of plaintiff and Peter Wen Lang Chen (phonetic) (Chen) of position in the organizational column (Column 1) with the slogan "Republicans for responsible government." Plaintiff also named the State of New Jersey as a defendant.

Plaintiff cites NJSA 19:23-18; 19:23-24; 19:34-52; 19:49-2; and 10:4-6, and also asserts denial of constitutional rights.

This Court will not impose any time bar that may exist. If there were any issues as to a time bar, this Court would consider the provisions of Rule 4:69-6C, relating to enlargement of time to apply to hear the matter on the merits because of the inherent public interest in election matters and in the interest of justice.

2) The following persons testified; Joseph Favaro, the Borough Clerk of Englewood Cliffs; Henry Shotmeyer, Chairman of the Bergen County Republican

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Organization; and Kathleen Donovan, the Bergen County Clerk. Various exhibits were introduced into evidence, including P-1 plaintiff's brief; P-2 defendant's (Donovan's); P-3 defendant's (Shotmeyer's) brief; P-4 plaintiff's rebuttal brief; P-S the Sank/Chen petition received by the borough clerk April 8th, 1998; P-6 the Wasik/Helvasian (phonetic) petition received by the borough clerk April 9th, 1998; P-7 republican party primary election copy; P-8 letter from the borough clerk to the county clerk dated April 16th, 1998 (except for legal conclusions).

J-1 primary election copy for Allendale; J-2 primary election copy for Emerson; J-3 primary election copy for Englewood Cliffs; J-4 primary election copy for Hasbrook Heights; J-5 primary election copy for New Milford; J-6 packet of six letters, the face letter being dated April 4th, 1998; J-7 copy of letter dated April 8th, 1998 from Chairman Shotmeyer to municipal chairman; J-8 copy of letter dated April 16th, 1998 from Mr. Shotmeyer to the county clerk.

P-10 copy of request for position on ballot dated April 7th, 1998 (Sank/Chen); P-il copy of request for position on ballot dated April 7th, 1998 (Wasik/Helvasian); P-12 letter from Kathleen Donovan to Sank dated April 21, 1998; P-13 copy of portion of a

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sample ballot of Englewood Cliffs for June 2nd, 1998; P-14 a sample ballot for the June 3rd, 1997 primary; P-5 copy of a ballot in 1993; P-16 sample ballot for the June 7th, 1994 primary; P-17 two pages from the 1998 County Directory; P-18 copy of a July 13, 1998 New York Times article about a lawsuit in Staten Island; P-19 copy of a June 3rd, 1997

New York Times article, re the Essex County Democratic Committee.

DD-1 county level petition for primary election, June 2nd, 1998; DD-2 was marked for identification only, it was a copy of primary election. Plaintiff's objection to its being marked into evidence was sustained.

3) Based on the testimony, exhibits, submissions, stipulations, evidence, proofs - and proofs, rather, adduced I find;

A) Plaintiff was a republican candidate for office of council in the borough of Englewood Cliffs in Bergen County in the primary election on June 2nd, 1998. Plaintiff choose to move or "bracket" her name on the nominating petition with that of Peter Wen Lang Chen pursuant to NJSA 19:23-18. The Sank/Chen nominating petition was delivered to the Englewood Cliffs Municipal Clerk on or about April 8th, 1998 seeking the designation/slogan "Republicans for

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responsible government." On or about April 9th, 1998 the nominating petition of candidates Roger Wasik and Nerham Halvasian (phonetic) was delivered to the Englewood Cliffs Municipal Clerk seeking the same designation (Responsible - Republicans for responsible government).

On or about April 16th, 1998 the Municipal Clerk of Englewood Cliffs conducted a random drawing for positioning on the ballot in accordance with NJSA 19:23-24. The results of the drawing were that the Sank/Chen bracket was chosen as first.

Sometime after April 16, 1998 Henry Shotmeyer, Campaign Manager of the Bergen County Republican

Candidates, consented to the Wasik/Helvasian bracket being placed in the organizational column pursuant to NJSA 19:49-2, and so informed the County Clerk, Kathleen Donovan.

Ms. Donovan notified plaintiff by letter dated April 21, 1998:

"In accordance with Title 19:49-2 you will not be in the organizational column in the June 2nd, 1998 primary election."

"If you wish a new slogan please phone in upon receipt of this letter informing of your new slogan, with a follow-up letter by April 24th, 1998."

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The voting machines used in the June 2nd, 1998 primary election listed the Wasik/Helvasian candidates under the organizational column (sometimes referred to as the republican line). The Sank/Chen candidates were listed in a non-organizational column (Column 2). The results of the election placed plaintiff third, thereby eliminating her candidacy for council in the November 1998 general election. Chen placed fourth.

As testified to by Henry Shotmeyer and as stipulated, at all times in question he served as both republican county chairman and as campaign manager for the county candidates for freeholder, and for the Bergen County Republican Committee line. He gave his consent to Wasik and Helvasian being placed in the organizational or republican - strike that, in the organizational or republican line with the slogan of "Republicans for a responsible government" (see J-3)

Mr. Shotmeyer served as campaign manager on a county-wide basis. His testimony is undisputed, that giving Wasik and Helvasian the republican or organizational line also gives them the slogan of "Republicans for a responsible government."

DD-1 in evidence sets forth, "County level petitions for primary election, June 2, 1998" for

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republicans. It lists three freeholder candidates, namely Barbara Chadwick (phonetic), Donald D. Wynent (phonetic), and Juan

M. Domingos, Jr. (phonetic), all with the slogan of "Republicans for a responsible government." Next to their names are the initials "HS" (for Henry Shotmeyer). It also lists two other freeholder candidates, namely Sobodin Scindari (phonetic) with slogan, "A young mind for a change." And Claudia Ann Bolin (phonetic) with "no slogan." Next to those names of Scindari and Bolin is a handrawn bracket followed by the handwritten word "column" (phonetic) and the number "2."

Attached to DD-1 is a letter from Mr. Shotmeyer to the county clerk dated April 16th, 1998 (also J-8 in evidence), setting forth the following:

"As you know I serve as the campaign chairman for the Bergen County Republican Organization's candidates for the office of Bergen County Freeholder."

"Please be advised that the candidates which shall appear on the June 2, 1998 primary ballot under the line 'Republicans for responsible government' are Barbara Chadwick, Donald Wynent, and Juan M. Domingos, Jr."

J-6 in evidence is a packet of six letters, all dated April 4th, 1998, to Mr. Henry Shotmeyer,

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three of which are from candidates seeking the office of freeholder, namely Barbara Chadwick, Donald D. Wynent, and Juan M. Domingos, Jr. Each of those letters state, in part, "I . . . hereby appoint you Henry . . . Shotmeyer as campaign manager."

It should be noted that DD-I also lists three other

candidates with the slogan of "Republicans for responsible government." They are William Pat Schuber (phonetic) for county executive, Jay Albert (phonetic) for sheriff, and Kathleen A. Donovan for county clerk. Schuber, Albert, and Donovan also wrote letters dated April 4th, 1998 (as part of J-6) to Mr. Shotmeyer stating, "I . . . hereby appoint you Henry . . . Shotmeyer as campaign manager."

B) Plaintiff alleges that the conduct of Kathleen Donovan and/or Henry Shotmeyer in denying her the organizational column was a violation of NJSA 19:23-18 (grouping of candidates); 19:23-24 (drawing for position on primary ballot procedure certification); 19:34-52 (endorsement of candidate by party a committee before primary: and 10:4-6 et seq. (the Open Public Meetings Act). She further alleges that application of NJSA 19:49-2 is unconstitutional, "as it conflicts with other state statutes violating due process rights. . . . "

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C) NJSA 19:23-24 provides for, in relevant part, that: "The position which the candidates and bracketed groups of names of candidates for the primary for the general election shall have, upon the primary election ballots . . . shall be determined by the county clerks . . . and excepting in counties where RS 19:49-2 applies, the position on the primary ballots. In the case of candidates for office or party position to be filled are to be voted for by the voters of the municipality only . . . shall be determined by the municipal clerk . . . in the following manner; the county clerk or his deputy, or the municipal clerk or his deputy, as the case may be, shall, at his office, on the 47th day prior to the primary election, at 3 o'clock in the afternoon, draw from the box, as here and after

described. . . . the first name drawn shall have first place, "the second name drawn second place, and so on. . . .

NJSA 19:49-2 relates to "printing official ballots, ballots in counties where voting machines are used, position of candidates' names on ballots", and provides in pertinent part, "the providing of the official ballots and the order of the precedence and arrangement of parties and of candidates shall be as

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now required by law, providing, however, that in those counties where voting machines are used the specifications for the printing of the official ballots shall be drawn by the county clerk."

"For the primary election for the general election in all counties where voting machines are or shall be used all candidates who shall file a joint petition with the county clerk or their respective - strike that, of their respective county, and who shall choose the same designation or slogan shall be drawn for position on the ballot as a unit, and shall have their names placed on the same line of the voting machine, and providing further that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk, as aforesaid, may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk, as aforesaid, by so notifying the county clerk of said county in writing within two days after the last day, or filing nominating petitions, and thereupon the county clerk shall forthwith notify the

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campaign manager of such candidates filing a joint petition, as aforesaid, of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition, as aforesaid "

Wasik and Helvasian complied with the provision of 19:49-2 for filing a petition bearing the same designation or slogan as the candidates filing a joint petition with the county clerk, and requesting their name be placed on the same line, triggering the consent of the campaign manager, Henry Shotmeyer, allowing for the placement of the Wasik/Helvasian names "on the same line of the voting machines on which appears the names of the candidates who have files joint petitions."

The contents of DD-1, together with the contents of the letters in the packet marked J-6 in evidence, satisfy the provisions of "joint petition", referred to in NJSA 19:49-2. It was also stipulated by the parties that Mr. Shotmeyer served as campaign manager for the county candidates for freeholder, and

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for the county -strike that, and for the Bergen County Republican Committee line.

As stated in QUAREMBA V. ALLAN , 67 NJ 1, 6 (1975):

"NJSA 19:49-2, by its express terms, applies 'in all counties where voting machines are or shall be used' and thus include Bergen County. It provides that candidates for offices whose petitions are required to be filed with the county clerk

and who file a joint petition and choose 'the same designation or slogan' (county candidates) 'shall be drawn for position on the ballot as a unit, and shall have their names placed on the same line of the voting machines'. Candidates for municipal or party office in any of the county's municipalities whose petition filed with the municipal clerk bears the same designation or slogan, and candidates whose petitions are filed with the Secretary of State, see NJSA 19:23-6, may upon request, and if the campaign manager of the county candidates consents thereto, have his or her name placed on the same line of the voting machine with those county candidates."

The QUAREMBA court discussed the interplay between NJSA 19:23-24, which requires candidates' names appear in the organizational column, and NJSA 19:49-2, which requires the county campaign manager's consent

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for a candidate's name to appear in the organizational column. The court stated, at Page 8:

"On its face the effect of the amendment was to limit the application of the pertinent provisions of NJSA 19:23-24 to counties where paper ballots were used."

We find no substance - strike that.

"We find no substance to plaintiff's second contention that the county clerk in counties using voting machines also must comply with the provisions of NJSA 19:23-24. . . . " Id. at 13 and 14.

"There is no warrant for ignoring the express statement embodied in NJSA 19:23-24, excepting from its operation counties to which NJSA 19:49-2 applies." Id. at

The QUAREMBA court, at Page 10, further discussed the conditional implication - strike that, the constitutional implications of NJSA 19:49-2:

"We are satisfied that there is no merit to any of plaintiff's constitutional arguments."

"Nothing in the challenged section inhibits any voter from voting for any person he chooses, or limits the right of any candidate to run for office. The fact that different procedures are provided governing the positioning of the names of candidates

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when voting machines are used, and when paper ballots are used, does not result in a denial either to the voters or the candidates of the equal protection of the laws." Id. at Page 11.

"Even if we were to disregard the presumption of validity which attaches to NJSA 19:49-2, it is clear that it is not invidiously discriminatory. The obvious differences in the physical make-up of the face of a voting machine and a paper ballot afford a reasonable basis for the Legislature's decision to provide different procedures governing the listing of candidates' names on the face of a voting machine than are provided for in listing such names when paper ballots are used."

The QUAREMBA court also cited with approval HARRISON V. JONES , 44 NJ Super. 456 (461-62 - strike that - 44 NJ Super. 456, 461-62 (App. Div. 1957), where the court stated:

"Plaintiff stressed the provisions of NJSA 19:23-24, indicating that 'excepting in counties where Section 19:49-2 of the revised statutes applies', the position of the primary ballots in the case of candidates for municipal office, or party position, shall be determined by a drawing to be conducted by the municipal clerk, and that the names of the candidates

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should be printed on the ballots 'in the order as determined as a result of the drawing'. A drawing was conducted by the Haledon Borough Clerk March 21, 1953, under which plaintiffs' names were drawn first, but by the very exception we have quoted from NJSA 19:23-24 the provisions of that section concerning the effect of drawings by municipal clerks are in applicable 'in counties where Section 19:49-2 applies. . . . by its terms the latter section applies to primary election for municipal or party office in counties where voting machines are used. Passaic is such a county. Therefore, Section 19:23-24 has no bearing here."

Accordingly, plaintiff's arguments relating to NJSA 19:23-24 and 19:49-2, and any constitutional issues are rejected.

D) Plaintiff's contentions relating to NJSA 19:34-52 is rejected. That statute provides:

"No state, county, or municipal committee of any political party shall, prior to any primary election, endorse the candidacy of any candidate for a party nomination or position."

That statute must be read in pari materia with NJSA 19:49-2, which specifically permits the procedure followed in this case under these circumstances.

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The case of KAVANAUGH V. MORRIS COUNTY DEMOCRATIC COMMITTEE, 121 NJ Super. 430 (Chancery Division 1972) is not dispositive of any issue involved in this case. In that case the court stated, at Page 438:

" . . . It is hereby declared that the defendant, Morris County Democratic Party's bylaw creating a screening committee for purposes of endorsing candidates for primary elections is a violation of N.J.S.A. 19:34-52, and therefore

invalid."

In that case the court also set forth, at Page 437:

"Election statutes are to be tested like all other statutes, but with a leaning to liberality in view of the great public purposes for which they are intended."

"One of these purposes is to purify the politics of the state by preventing fraud and wrongdoing in the nominating procedure."

"At one time party conventions provided the party nominees. However, because of public dissatisfaction with the political manipulation of conventions, primaries have replaced the convention procedure." (Citations omitted).

In the present case there is no claim of

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fraud, nor has there been any showing of any specific wrongdoing.

The operative facts and the issues involved in this case do not require any ruling relating to the bylaws.

E) Plaintiff's argument as to NJSA 10:4-6 et seq., relating to the Open Public Meetings Act is rejected. NJSA 10:4-8A defines a public body to mean:

"A commission, authority, board, council, committee, or any other group of two or more persons organized under the laws of this state, and collectively empowered as a voting body to perform a public governmental function effecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to expend public funds, including the Legislature.

But does not mean or include the judicial branch of the government, any grand or petty jury, any parole board, or any agency or body acting in a parole capacity, the state commission of investigation, the apportionment committee

established under Article 4, Section 3 of the constitution, or any political party committee organized under Title 19 of the revised statutes."

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This Court cannot find that the Bergen County Republican Organization is a "public body" as contemplated by this act. It has not been demonstrated that the Bergen County Republican Organization is empowered as a voting body to perform a public governmental function effecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds "

Further, this Court cannot find that there was any meeting which sought to accomplish any "governmental action akin to a legislative enactment." In WOODBURY DAILY TIMES COMPANY, INC. V. GLOUCESTER COUNTY SEWERAGE AUTHORITY, 151 NJ Super. 160, 161 (Law Division 1977) the court stated:

" . . . It becomes clear that it is the legislative intent of the Open Public Meetings Act that, where meetings are held at which governmental action akin to legislative enactment is to be accomplished, the enacting body's final determination, as well as the discussion of each individual member, be open to the public."

In the instant case the campaign manager, Henry Shotmeyer, simply exercised his right of consent, as provided in NJSA 19:49-2, and the county clerk

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simply performed her ministerial duties in accordance with that statute.

F) The actions taken by Henry Shotmeyer and Kathleen

Donovan were statutorily authorized. Plaintiff has failed to demonstrate that any conduct or action by either of these defendants was in any way impermissible or constituted any violation.

Accordingly, a judgment is entered in favor of the defendants and against the plaintiff of no cause for action. The verified complaint is dismissed with prejudice. Any application for fees is denied.

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APPENDIX G

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
BERGEN COUNTY
DOCKET NO. L-5576-97
APP. DIV. NO._____

DIANE SANK,	)	
	)	
Plaintiff,	)	
vs.	)	TRANSCRIPT
	)	of
STATE OF NEW JERSEY,	)	TRIAL
et al,	)	
	)	
Defendant.	)	

Place: Bergen County
Justice Center
10 Main St. Room 314
Hackensack, NJ 07601

Date: August 14, 1997

BEFORE:

HONORABLE ARTHUR L. TROAST, J.S.C.

TRANSCRIPT ORDERED BY:

DIANE SANK (173 Charlotte Place, Englewood, New Jersey 07632)

Transcriber Denise Sacca
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Deputy Attorney General
Attorney for the Defendants, Bergen County Board of Elections, Bergen County Superintendent of Elections and Peter G. Verniero, Attorney General of New Jersey

JOHN L. MOLINELLI, ESQ. (Herten, Burstein, Sheridan, Cevasco, Bottinelli & Litt) Attorney for the Defendant, Gerald A. Calabrese

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THE COURT DECISION

THE COURT: All right. This is an election case. This case arises out of a June 3rd, 1997 primary election in the Borough of Englewood Cliffs. Plaintiff ran as a candidate for the local governing body in Englewood Cliffs in the primary. She wanted to be a republican candidate for the Borough Council. There was a tie vote.

The facts of the matter before the Court have been stipulated. We know that as a result of the primary Mr. Bancroft received 153 votes and Dr. Sank and Mr. Ferro each

received 150 votes. The republican county committee people in Englewood Cliffs took action after the tie vote. Again, there was a June 3rd, 1997 republican primary that resulted in a tie vote for the second position for the council seat.

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Pursuant to NJSA 19:13-(24), the Municipal Committee of Englewood Cliffs voted in favor of Ramon Ferro as the party's candidate. They chose Mr. Ferro over Diane Sank.

The -- the plaintiff contends that 19:13-20 is unconstitutional. One of the contentions of the plaintiff is that the action of the Republican County Committee choosing Mr. Ramon Ferro over Diane Sank violates the one-person one-vote principle of our law.

The plaintiff contends that it's a violation of the United States Constitution. The plaintiff alleges that there's a violation of plaintiff's due process and equal protection rights.

NJSA 19:13-24 is a law enacted by the United -- by the New Jersey Legislature. It's an election regulation. It's clear that the states have certain powers to enact reasonable regulations in connections with elections.

The TIMMONS decision of the United States Supreme Court addresses this issue. There's no question that the TIMMONS decision -- TIMMONS VS. TWIN CITIES AREA NEW PARTY. which I'm going to cite here is 117 Supreme Court 13:64, a 1997 Supreme Court Decision gives us some guidance in this situation. As a practical matter, states have to enact reasonable

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regulations in order to regulate elections.

The United States Supreme Court has stated in TIM-

MONS that "When deciding whether a state election law violates constitutional rights, the Court must weigh the character and magnitude of the burden the state's rule imposes on those rights against the interest the state contends justify the burden and consider the extent to which the state's concern make the burden necessary."

This is a quote from TIMMONS: "Common sense, as well as constitutional -- I'm sorry. This is a quote from BERDICT VS. TOKUSI (phonetic). 504 U.S. 428 at Page 432, a 1992 Supreme Court Case. "Common sense as well as constitutional law compels the conclusion that government must play an active role in structuring elections. As a practical matter there must be a substantial regulation of elections if they're to be fair and honest and if some sort of order rather than chaos is to accompany the democratic process."

Here we had a primary election and there was a tie -- tie vote. The legislature, in its wisdom, decided that the local county committee people should decide who will be the party candidate. Regulations imposing severe burdens on plaintiff' s rights must be narrowly tailored and advance a compelling state

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interest. However, lesser burdens trigger less exacting review and in state's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory regulations .

I conclude that this is a reasonable nondiscriminatory regulation that we are dealing with here in connection with this statute. The -- the statute, of course, provides that, "In the event of a vacancy, however caused, among candidates nominated at primaries, which vacancies shall occur not later

than the 51st day before the general election or in the event of inability to select a candidate because of a tie vote at such primary, a candidate shall be selected in the following manner."

And then Paragraph 4 thereafter provides, "In the case of an office to be filled by the voters of a portion of a single county, the candidate shall be selected by those members of the county committee of the party wherein the vacancy has occurred who represent those portions of the county which are comprised in the district from which the candidate is to be elected."

That is the statute that we're dealing with here. The legislature has established a reasonable mechanism for breaking the tic vote. The voters have

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spoken and now it must be determined who is going to be the party candidate after the primary election.

Looking at the statute it's clear that the statute has been set up to provide an efficient way of choosing a party candidate. It's clear that the statute has been set up to provide for a reasonably quick decision. In this case there was a decision by the local county committee people.

Based upon the testimony before the Court I find that the county committee appears to have made its selection following the usual procedures of the party county committee. They did not interview the candidates. By chance, Mr. Ramon was a member of the Republican County Committee and was present when the vote was taken. However, he did not campaign at the meeting. He did not speak on his own behalf before the meeting. He kept -- the county committee chose Mr. Ramon over -- Mr. Ferro -- Mr. Ramon Ferro over Dr. Sank. The Court is not going to interfere with the workings of the local

Republican County Committee.

Now it's also -- it is also clear that although there had been a drawing earlier for places on the ballot, that as a result of N.J.S.A. 19:49-2 and direction from the campaign manager for the free holder candidates who are running as republicans, that a party

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line was selected. It's clear that the incumbency, Mr. Bancroft -- well, it -- it's clear that the -- yes, Mr. Bancroft and -- and Mr. Ferro were going to be on the county line.

All of the candidates were aware of the form of the primary ballot. The plaintiff, Dr. Sank, did not object to the form of the primary ballot before the election. She ran at the election and there was a tie vote. Again, the -- the tie vote was broken as provided by statute.

I don't find any valid basis for finding the statute unconstitutional based upon the constitutional right for one person to have one vote. There aren't any cases that support that position as far I'm concerned.

I find that the plaintiff has failed to demonstrate any burden on her candidacy that was restricted by the statute. With regard to election statutes, we know they should be liberally construed in recognition of the fundamental governmental rights and interest at stake.

The legislative purpose of 19:13-20 was to permit a quick and orderly choice of a party candidate if there was a tie vote in the primary election. The -- the Court is not inclined to dictate to the local

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parties with regard to the candidates who are to run as the republican candidates.

Again. 19:13-20 was a statute that serves an important public purpose. It was designed to break a tie, such as we have in this case. It was designed to determine who would be the local party candidate at the general election.

Again, I find that it is a reasonable nondiscriminatory mechanism in the election system. I'm concluding that there is no sound basis for finding that this statute is unconstitutional.

.I find that the action of the election officials prior to the primary election followed the usual course and that 19:49-2 provides a basis for setting up the republican organization line the way it was set up for the primary.

I find that once the -- the republican party determined who would be on the republican party line that the drawing, pursuant to 19:23-24, was superseded.

I find that the plaintiff has failed to prove a cause of action. I'm going to dismiss the plaintiff's complaint with prejudice.

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APPENDIX H

New Jersey Statutes

TITLE 19 ELECTIONS

19:1-1.Definitions

19:1-1. As used in this Title:

"Election" means the procedure whereby the electors of this State or any political subdivision thereof elect persons to fill public office or pass on public questions.

"General election" means the annual election to be held on the first Tuesday after the first Monday in November.

"Primary election" means the procedure whereby the members of a political party in this State or any political subdivision thereof nominate candidates to be voted for at general elections, or elect persons to fill party offices, or delegates and alternates to national conventions.

APPENDIX I

STATE OF NEW JERSEY CONSTITUTION

ARTICLE I. RIGHTS AND PRIVILEGES

1. Natural and unalienable rights

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

2. Political power; object of government

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.

APPENDIX J

New Jersey Statutes

19:23-18. Grouping of candidates

Several candidates for nomination to the same office may in such petitions request that their names be grouped together, and that the common designation to be named by them shall be printed opposite their names. If two candidates or groups shall select the same designation, the secretary of state, county clerk or municipal clerks, as the case may be, shall notify the candidate or group whose petition was last filed, and such candidate or group shall select a new designation.

APPENDIX K

New Jersey Statutes

19:23-24. Primary election ballots; position

The position which the candidates and bracketed groups of names of candidates for the primary for the general election shall have upon the primary election ballots, in the case of candidates for nomination for members of the United States Senate, Governor, members of the House of Representatives, members of the State Senate, members of the General Assembly, choice for President, delegates and alternates-at-large to the national conventions of political parties, district delegates and alternates to conventions of political parties, candidates for party positions, and county offices or party positions which are to be voted for by the voters of the entire county or a portion thereof greater than a single municipality, including a congressional district which is wholly within a single municipality, shall be determined by the county clerks in their respective counties; and, excepting in counties where R.S.19:49-2 applies, the position on the primary ballots in the case of candidates for nomination for office or party position wherein the candidates for office or party position to be filled are to be voted for by the voters of a municipality only, or a subdivision thereof (excepting in the case of members of the House of Representatives) shall be determined by the municipal clerk in such municipalities, in the following manner: The county clerk, or his deputy, or the municipal clerk or his deputy, as the case may be, shall at his office on the 47th day prior to the primary election at three o'clock in the afternoon draw from the box, as hereinafter described, each card separately without knowledge on his part as to which card he is drawing. Any legal voter of the county or

municipality, as the case may be, shall have the privilege of witnessing such drawing. The person making the drawing shall make public announcement at the drawing of each name, the order in which same is drawn, and the office for which the drawing is made. When there is to be but one person nominated for the office, the names of the several candidates who have filed petitions for such office shall be written upon cards (one name on a card) of the same size, substance and thickness. The cards shall be deposited in a box with an aperture in the cover of sufficient size to admit a man's hand. The box shall be well shaken and turned over to thoroughly mix the cards, and the cards shall then be withdrawn one at a time. The first name drawn shall have first place, the second name drawn, second place, and so on; the order of the withdrawal of the cards from the box determining the order of arrangement in which the names shall appear upon the primary election ballot. Where there is more than one person to be nominated to an office where petitions have designated that certain candidates shall be bracketed, the position of such bracketed names on the ballot (each bracket to be treated as a single name), together with individuals who have filed petitions for nomination for such office, shall be determined as above described. Where there is more than one person to be nominated for an office and there are more candidates who have filed petitions than there are persons to be nominated, the order of the printing of such names upon the primary election ballots shall be determined as above described.

The county clerk in certifying to the municipal clerk the offices to be filled and the names of candidates to be printed upon the primary election ballots, shall certify them in the order as drawn in accordance with the above described

procedure, and the municipal clerk shall print the names upon the ballots as so certified and in addition shall print the names of such candidates as have filed petitions with him in the order as determined as a result of the drawing as above described. Candidates for the office of the county executive in counties that have adopted the county executive plan of the "Optional County Charter Law," P.L.1972, c.154 (C.40:41A-1 et seq.), shall precede the candidates for other county offices for which there are candidates on the primary election ballot.

APPENDIX L

New Jersey Statutes

19:34-52. Indorsement of candidate by party committee before primary

No state, county or municipal committee of any political party shall prior to any primary election indorse the candidacy of any candidate for a party nomination or position.

APPENDIX M

New Jersey Statutes

19:49-2. Printing official ballots; ballots in counties where machines are used; position of candidates' names on ballot

All official ballots shall be printed on clear white paper or cardboard of such form and size as will fit the ballot frames of the machines, printed in black ink in type as large as the space will reasonably permit; provided, however, that any public question which shall be placed on the ballot shall be printed in red ink and above any public question to be voted upon by the voters of the entire State there shall be printed, also in red ink, a description of the public question, which description shall not exceed six words and shall be printed in type as large as is practicable. Party nominations shall be arranged on each voting machine, either in columns or horizontal rows, the caption of the various ballots on the machines shall be so placed on the machines as to indicate to the voter what push know, pointer, lever or other device is to be used or operated in order to vote for the candidates or candidate of his choice. The providing of the official ballots and the order of the precedence and arrangement of parties and of candidates shall be as now required by law; provided, however, that in those counties where voting machines are used, the specifications for the printing of the official ballots shall be drawn by the county clerk.

For the primary election for the general election in all counties where voting machines are or shall be used, all candidates who shall file a joint petition with the county clerk of their respective counties and who shall choose the same

designation or slogan shall be drawn for position on the ballot as a unit and shall have their name placed on the same line of the voting machine; and provided further, that all candidates for municipal or party office in municipalities in the counties where the voting machines are or shall be used shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk as aforesaid, may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid.

APPENDIX N

New Jersey Statutes

19:13-20. Vacancy procedure

In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election, or in the event of inability to select a candidate because of a tie vote at such primary, a candidate shall be selected in the following manner:

a. (1) In the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State committee of the political party wherein such vacancy has occurred.

(2) In the case of an office to be filled by the voters of a single and entire county, the candidate shall be selected by the county committee in such county of the political party wherein such vacancy has occurred.

(3) In the case of an office to be filled by the voters of a portion of the State comprising all or part of two or more counties, the candidate shall be selected by those members of the county committees of the party wherein the vacancy has occurred who represent those portions of the respective counties which are comprised in the district from which the candidate is to be elected.

(4) In the case of an office to be filled by the voters of a portion of a single county, the candidate shall be selected by those members of the county committee of the party wherein the vacancy has occurred who represent those portions of the county which are comprised in the district from which the candidate is to be elected.

At any meeting held for the selection of a candidate under this subsection, a majority of the persons eligible to vote thereat shall be required to be present for the conduct of any business, and no person shall be entitled to vote at that meeting who is appointed to the State committee or county committee after the seventh day preceding the date of the meeting.

In the case of a meeting held to select a candidate for other than a Statewide office, the chairman of the meeting shall be chosen by majority vote of the persons present and entitled to vote thereat. The chairman so chosen may propose rules to govern the determination of credentials and the procedures under which the meeting shall be conducted, and those rules shall be adopted upon a majority vote of the persons entitled to vote upon the selection. If a majority vote is not obtained for those rules, the delegates shall determine credentials and conduct the business of the meeting under such other rules as may be adopted by a majority vote. All contested votes taken at the selection meeting shall be by secret ballot.

b. (1) Whenever in accordance with subsection a. of this section members of two or more county committees are empowered to select a candidate to fill a vacancy, it shall be the responsibility of the chairmen of said county committees, acting jointly not later in any case than the seventh day following the occurrence of the vacancy, to give notice to each of the members of their respective committees who are so empowered of the date, time and place of the meeting at which the selection will be made, that meeting to be held at least one day following the date on which the notice is given.

(2) Whenever in accordance with the provisions of subsection a. of this section members of a county committee

are empowered to select a candidate to fill a vacancy, it shall be the responsibility of the chairman of such county committee, not later in any case than the seventh day following the occurrence of the vacancy, to give notice to each of the members of the committee who are so empowered of the date, time and place of the meeting at which the selection will be made, that meeting to be held at least one day following the date on which the notice is given.

(3) A county committee chairman or chairmen who call a meeting pursuant to paragraph (1) or (2) of this subsection shall not be entitled to vote upon the selection of a candidate at such meeting unless he or they are so entitled pursuant to subsection a.

(4) Whenever in accordance with the provisions of subsection a. of this section the State committee of a political party is empowered to select a candidate to fill a vacancy, it shall be the responsibility of the chairman of that State committee to give notice to each of the members of the committee of the date, time and place of the meeting at which the selection will be made, that meeting to be held at least one day following the date on which the notice is given.

c. Whenever a selection is to be made pursuant to this section to fill a vacancy resulting from inability to select a candidate because of a tie vote at a primary election, the selection shall be made from among those who have thus received the same number of votes at the primary.

d. A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election, and a statement of such selection shall be filed with the Secretary of State or the appropriate county clerk, as the case may be, not later than said 48th day, and in the following manner:

(1) A selection made by a State committee of political party shall be certified to the Secretary of State by the State chairman of the political party.

(2) A selection made by a county committee of a political party, or a portion of the members thereof, shall be certified to the county clerk of the county by the county chairman of such political party; except that when such selection is of a candidate for the Senate or General Assembly or the United States House of Representatives the county chairman shall certify the selection to the State chairman of such political party, who shall certify the same to the Secretary of State.

(3) A selection made by members of two or more county committees of a political party acting jointly shall be certified by the chairmen of said committees, acting jointly, to the State chairman of such political party, who shall certify the same to the Secretary of State.

e. A statement filed pursuant to subsection d. of this section shall state the residence and post office address of the person so selected, and shall certify that the person so selected is qualified under the laws of this State to be a candidate for such office, and is a member of the political party filling the vacancy. Accompanying the statement the person endorsed therein shall file a certificate stating that he is qualified under the laws of this State to be a candidate for the office mentioned in the statement, that he consents to stand as a candidate at the ensuing general election and that he is a member of the political party named in said statement, and further that he is not a member of, or identified with, any other political party or any political organization espousing the cause of candidates of any other political party, to which shall be annexed the oath of allegiance prescribed in R.S. 41:1-1 duly taken and subscribed by him before an officer authorized

to take oaths in this State. The person so selected shall be the candidate of the party for such office at the ensuing general election.

APPENDIX O

CHAPTER 4

OPEN PUBLIC MEETINGS

10:4-6. Short title

This act shall be known and may be cited as the "Open Public Meetings Act."

Introductory Statement
Assembly, No.1030 - L.1975, c. 231

This bill requires that the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions, of public bodies, except where the public interest or individual rights would be jeopardized. The public's right to know the process by which governmental decisions are made and to witness that process in full detail may be obstructed by needlessly barring members of the public and the press from certain policymaking meetings of public bodies. If the public and the press cannot attend, they cannot learn of many positions that are considered or taken at such meetings by individual officials serving the public. Lack of this information can lessen public confidence in governmental decisions and impair the public's function of holding officials accountable in a democracy.

Section 3 determines the scope of the act by defining 'public body,' 'meeting' and 'public business.' To be covered, a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons' rights. Therefore, informal or purely advisory bodies with no effective authority are not covered. Neither are groupings composed of a public

official with subordinates or advisors, such as a mayor or the Governor meeting with department heads or cabinet members who are not empowered to act by vote. Specific exemptions are provided for the judiciary, parole bodies, the State Commission of Investigation and political party organizations.

To be covered, a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business. Therefore, typical partisan caucus meetings and chance encounters of members of public bodies are not covered. Specific exemptions are provided for public bodies meeting as a part of a convention and meetings where an effective majority fails to attend.

Public business, to be covered, need merely be related in some way to the public body's function or business.

Section 3 also defines the 'adequate notice' which is required for the public body's regular and special meetings. Normally, 48 hours' advance notice must be prominently posted, filed with a certain officer of the public body, and provided to two newspapers. Publication of legal notice is not required.

Section 4 prohibits meetings without adequate notice except upon a 3/4 vote of the members present where the only matters that may be discussed are matters of such urgency, that waiting to give notice would result in substantial harm to the public interest. Notice of the meeting must be posted and provided to two newspapers as soon as possible.

Section 5 requires a statement at every meeting confirming that adequate notice was provided or if it was not provided, presenting the reasons why it was not provided. Embarrassing statements required for avoidable emergencies are intended to discourage public officials from circumventing notice requirements by deliberately waiting until matters

become emergencies.

Section 6 prohibits purposely circumventing the act by failing to invite one or more members of a public body so that a meeting of a majority of a public body would not qualify under section 3b.

Section 7 provides that a public body may limit public participation in its meetings. In addition, specific topics which a public body may be permitted to discuss in private are listed. Private deliberation is permitted in cases where the public interest would otherwise be endangered or the personal privacy or guaranteed rights of individuals would be in danger of unwarranted invasion. Public bodies may meet in closed session when the matters under discussion (1) are considered confidential by federal law, state statute or court rule, (2) would jeopardize receipt of federal funds, (3) constitute an unwarranted invasion of individual privacy, (4) concern collective bargaining, (5) involve purchase lease or investment using public funds, or concern the setting of banking rates, (6) concern investigations of violations or possible violations of the law, or techniques of protecting the safety and property of the public, where disclosure of such techniques could impair such protection, (7) are covered by the attorney-client privilege, (8) concern personnel, or (9) involve certain proceedings which could result in a civil penalty, suspension, or loss of license.

Section 8 requires that whenever a public body seeks to meet in private, it must first pass a resolution at a public meeting stating its intention to do so. The resolution must also state the general nature of the matters to be discussed and approximately when, if ever, the matters discussed can be made public.

Section 9 requires public bodies to keep comprehensible minutes on the essentials of all meetings. Minutes are not

intended to be verbatim or even to include every comment made. The requirement that minutes be comprehensible is intended to include print - exclude shorthand. Minutes must be promptly available to the public, except for material covering meetings or portions of meetings closed to the public.

Section 10 provides that actions taken by a public body at a meeting not held in accordance with this act are voidable in Superior Court upon legal action brought by any person, provided that the action is filed within 45 days after the action in question has been made public. A public body may correct an action which does not comply with this act by acting anew at any time at a public meeting that does comply with this act; however such corrective action does not eliminate any individual liability for penalties under section 12. Section 10 also provides that an action such as adoption of an ordinance where there has been advance published notice of at least 48 hours shall not be voidable solely for failure to conform with notice requirements of this act.

Section 11 grants any citizen the right to apply for injunctive orders or other remedies to guarantee compliance with this act.

Section 12 provides $100.00 penalties for a first offense of knowingly violating the preceding sections of the act and penalties of up to $500.00 for subsequent offenses. Action for penalties may be brought in any county district court in the county where the alleged violation occurred, but only by appropriate officials in order to guard against harassment of members of the public body.

Under section 13, a yearly schedule and any revised schedule of any regular meetings are to be posted and distributed similarly to the 48-hour advance notice of meetings. However, unavailable information such as meeting locations or information on special meetings need not be

included in such annual notices or revisions as long as they are provided in the 48-hour notice.

Section 14 requires public bodies to mail meeting notices to any member of the public and the media requesting them and authorizes charging a small fee, from which the media may be exempt, to cover the costs of notifying such parties.

New Jersey Statute

10:4-7. Legislative findings and declaration

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

The Legislature further declares it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.

The Legislature, therefore, declares that it is the

understanding and the intention of the Legislature that in order to be covered by the provisions of this act a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons' rights; that, therefore, informal or purely advisory bodies with no effective authority are not covered, nor are groupings composed of a public official with subordinates or advisors, who are not empowered to act by vote such as a mayor or the Governor meeting with department heads or cabinet members, that specific exemptions are provided for the Judiciary, parole bodies, the State Commission of Investigation, the Apportionment Commission and political party organization; that to be covered by the provisions of this act a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business; and therefore, typical partisan caucus meetings and chance encounters of members of public bodies are neither covered by the provisions of this act, nor are they intended to be so covered.

10:4-8. Definitions

As used in this act:

a. "Public body" means a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature, but does not mean or include the judicial branch of the government, any grand or petit jury, any parole board

or any agency or body acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission established under Article IV, Section III, of the Constitution, or any political party committee organized under Title 19 of the Revised Statutes.

b. "Meeting" means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.

c. 'Public business" means and includes all matters which relate in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business.

d. "Adequate notice" means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed

or any agency or body acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission established under Article IV, Section III, of the Constitution, or any political party committee organized under Title 19 of the Revised Statutes.

b. "Meeting" means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.

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to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body's geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body's geographic boundaries are coextensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction. For any other public body the filing shall be with the clerk or chief administrative officer of such other public body and each municipal or county clerk of each municipality or county encompassed within the jurisdiction of such public body. Where annual notice or revisions thereof in compliance with section 13 of this act[1] set forth the location of any meeting, no further notice shall be required for such meeting.

10:4-15. Proceeding in lieu of prerogative writ to void action at nonconforming meeting; parties; limitation; corrective or remedial action

a. Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for

failure to conform with any notice required in this act.

b. Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void.

APPENDIX P

THE NEW YORK TIMES METRO

MONDAY, JULY 13, 1998
Political Notebook

Candidate is Suing to Change Rules for Ballot Position
By JONATHAN P. HICKS

Just as top billing carries a certain cachet in movies, it holds significance in politics, contends G. Oliver Koppell, the former New York Attorney General who is seeking the Democratic nomination for his old job.

Mr. Koppell, who was defeated in a four-way Democratic primary in 1994 by Karen S. Burstein, is to file a lawsuit in United States District Court in Manhattan this morning to try to change the way the state places candidates' names on the ballot.

Under state election law, placement on the ballot in statewide primary contests is determined by lot. If a candidate wins that lottery and receives the top spot on the ballot, that name appears at the top of every ballot throughout the state, except those in New York City, where the order of candidates' names is rotated. In that method, each candidate is at the top of the ballot in about an equal number of election districts.

Mr. Koppell, who this year is again in a four-way race for the Democratic nomination for Attorney General, is asking the court to order the state's Board of Elections to adopt the system used in New York City. The primary election will be held Sept.15.

52a

In the documents submitted by Mr. Koppel, he cites findings by Henry Bain, a Maryland political scientist who

several years ago researched the impact of ballot placement. Mr. Bain's study suggested that in elections for positions that were not the subject of widespread attention in the news media, many voters select the candidates whose names appear first on a ballot.

A candidate who appears in the first position, Mr. Bain contended, has an advantage of three to four percentage points of the vote. Many politicians in New York suggest that the figure is even higher, as much as 10 percentage points in a crowded race.

"The current system - outside of the city of New York - is substantially unfair," Mr. Koppell said. "Because it is now simply a question of who is lucky rather than what system is fair. We have analyzed primary results, and we found that uniformly, the person in first position did better than the others. It may well have made a difference in my defeat In the 1994 primary."

In that four-way race, Ms. Burstein received 31 percent of the vote and Mr. Koppell came in second, with 29 percent.

Mr. Koppell has a reason to feel especially strongly about the ballot placement issue: His name appeared last on the ballots outside New York City in that primary.

Mr. Koppell said his suit seeks to change ballot position rules for all elected offices in the state. "We're looking for this change to apply to every race, every office," Mr. Koppell said. "We're not seeking just to make my race fair, although that's my ultimate interest."

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(3)

No. 99-1984

Supreme Court, U.S.
FILED
SEP 13 2000
CLERK

In The

Supreme Court of the United States

October Term, 1999

DIANE SANK,

Petitioner,

v.

NEW JERSEY, ET AL,

Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

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Englewood Cliffs,
New Jersey 07632
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ADDENDUM OF STATEMENT OF CASE

As of this date, no Respondent in this matter has filed a formal brief in opposition to this petition that conforms to the rules promulgated by this Court. The time for such responses has run. The New Jersey Office of the Attorney General, has however, filed a letter brief which is permitted by the *New Jersey Rules of Court*. (See Letter Brief in Appendix A at 1a).

The letter brief advances arguments why this Court should not grant certiorari and cites to the New Jersey appellate decision which joined the 1997 and 1998 cases into this single matter which is the subject matter of this petition.

Inasmuch as the letter brief advances legal arguments and cites an authority for reasons not to grant the Petitioner a Writ, Petitioner therefore submits this reply brief.

REASONS FOR GRANTING THIS PETITION

POINT I THE ATTORNEY GENERAL'S LETTER BRIEF DOES NOT CONFORM TO THE RULES OF THIS COURT AND SHOULD BE STRICKEN FROM THE RECORD.

Rule 15 of *the Rules of the Supreme Court of the United State* govern the submission, content, and format of briefs in opposition. This rule was not followed by the Attorney General. As a result of his non-conforming letter brief, Petitioner was placed in a dilemma. She could either ignore the existence of the letter brief and pray that this Court would ignore the document and its arguments -- or she could reply, rebutting the Attorney General's arguments against granting a Writ.

The Petitioner comes before this Court *pro se*. She is wary of the reasons the Attorney General chose to waive his right to file a formal brief in this matter and at the same time,

file a letter brief. The Attorney General has a virtual army of attorneys at his command who could file a conforming brief and are members of the Supreme Court Bar. Given the weight of his office, is this a strategic ploy whereby the Attorney General seeks to advance arguments by letter that could influence this Court yet unwittingly go unchallenged by a *pro se* Petitioner? There is no question that the letter was intended as a letter brief, to wit: this Court received a second letter from the attorney representing another Respondent in this matter wherein counsel expressly concurred with the "reasons" given by the Attorney General for denying the Petitioner a Writ. (Appendix B at 3a).

The Petitioner files this reply brief as a logical, common-sense response to the Attorney General's letter brief. She chooses not to risk that this Court would accept the Attorney General's arguments as depositive and unchallenged.

The Petitioner respectfully asks this Court to strike the letter brief with prejudice for non-conformity with the rules of Court and refuse any other briefs from the Attorney General that might be submitted in an untimely manner.

POINT II THE APPELLATE COURTS FAILED TO RENDER A DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The facts giving rise to this petition are clear. Twice the Petitioner failed to win primary elections because of constitutionally unfair, primary election laws. To prevent inevitable injury in 1997, before the general election occurred -- and in time to have a special election -- Petitioner sought a Temporary Restraining Order and was denied. The subsequent 1997 trial and appeal then proceeded at a snail's pace and languished in the appellate court until that court could join the 1998 case in which the Petitioner had attempted

accelerated and emergent relief at every step in the judicial process -- only to be denied at each step.

Finally, on October 6, 1999, the Appellate Division issued an opinion which joined the 1997 and 1998 cases, coming to the same conclusion as to both of the Petitioner's appeals. In short, the court dismissed *both* appeals as moot, chiding the Petitioner's failure to seek accelerated process in the 1997 case and ignoring the fact that she did seek accelerated process in 1998.

The appellate decision is analogous to a tired but often true cliché -- "damned if you do and damned if you don't." The egregious irony of the decision is that the appellate court issued their denial on the grounds of mootness which they themselves created artificially!

Furthermore it is postulated by Petitioner, that the issues presented herein will forever evade review by the state courts because of the underlying political considerations of evaluating the various onerous state statutes.

Petitioner argues that the lower courts' grounds for denying relief were neither adequate and independent. Neither New Jersey's election laws nor rules of court mandate that an election suit be brought before an election. The rule of the case cited by the appellate court was taken out of context and paraphrased and when it is read in its entirety, endorses the Petitioner's position. For example, in its entirety, *In the Matter of the Alleged Error in the Preparation of the Ballot for the Recall Election in the City of Hackensack*, 31 *N.J.* 592, 598 (1960), the court stated

> The time to protest is before the election, and not, as here, after the event. Elections are solemn events of tremendous public significance. We recently reiterated that in the absence of malconduct or fraud a concluded election will not be voided for an irregularity in the ballot unless it can be said that in

> all human likelihood it interfered with the full and free expression of the popular will and thus influenced the result.

Petitioner submits that her case in a perfect example of election practices which interfered with the free expression of voters and influenced election results. Furthermore, this Court has ruled in the past that although it would not normally consider the correctness of the non-federal ground, it would do so if the ground was "an obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. et al*, 326, 332 *U.S.* 120 (1945).

POINT III THE ISSUES RAISED HEREIN PRESENT POLITICAL QUESTIONS OF GREAT PUBLIC IMPORTANCE THAT ARE EGREGIOUSLY REPETITIOUS AND THE LOWER COURTS CONTINUE TO EVADE REVIEW ON THEIR MERITS AND PROACTIVELY MOOT THE ISSUES FOR SUBSEQUENT COURTS.

The Attorney General would have this Court deny Petitioner certiorari inasmuch as the New Jersey appellate court declared the two cases in this matter as "moot." The appellate court stated that "[a]lthough this court may decide moot controversies where issues of great importance are presented . . . we see no reason to invoke this power in the present case." (See Petitioner's brief, Appendix B at 8a). What the Attorney General in his letter brief and the appellate court failed to acknowledge, was the fact that the appellate court by its own proactive inaction, created the mootness issue now before this Court. Furthermore the court chose to ignore the Constitutional issues, which by their very nature, can be raised at any time. By denying certification, the New Jersey Supreme Court effectively endorsed the appellate decision.

In reply, the Petitioner relies upon and submits to this Court that the rationale of *Morse et al. v. Republican Party of Virginia*, 517 *U.S.* 186 (1996), should be controlling for the issues before this Court. In *Morse* the appellees argued that the issue before the court was moot because the party convention had already been held. The Morse Court expressly stated, "Like other cases challenging electoral practices. *** this controversy is not moot because it is "capable of repetition, yet evading review," citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

It should also be noted that from 1969 until September 1996, the *New Jersey Court Rules*, specifically *R.* 1:2-5, directed trial and appellate courts to accord certain cases accelerated calendar preferencing, including election actions, actions to which the State was a party; and actions in lieu of prerogative writs. The Petitioner's 1998 case fell into all three of these categories. It is an election action, an action in lieu of prerogative writ, and most important, the State of New Jersey was a party-defendant. The Official Comment to the 1996 deletion of the rule made it clear that the deletion of the rule was not intended to reflect an altered administrative perception of the necessity for appropriate trial preferences. Pressler, *Current N.J. Court Rules*, Comment R. 1:2-5. (Gann).

In past instances the New Jersey Appellate Court and the New Jersey Supreme Court recognized and acknowledged election cases, including primaries, as a class, as matters involving issues of urgent and great public importance, to receive emergent status and/or accelerated hearings and decisions. *Farrington v. Falcey*, 96 *N.J. Super.* 409, 412 (App. Div. 1967); *Bado v. Gilfert*, 13 *N.J. Super.* 363 (App. Div. 1951) and *Moskowitz v. Grogan*, 101 *N.J. Super.* 111

(App. Div. 1968); *Catania v. Haberie*, 123 *N.J.* 438 (1991); *Stevenson v. Gilfert*, 13 *N.J.* 496, 498 (1953) and *Fields v. Hoffman*, 105 *N.J.* 262 (1987). This is but a sampling of the cases.

Petitioner submits that this United State Supreme Court is the Petitioner's "court of last resort" inasmuch as this petition raises political issues which the political parties would like to go away. It is the Petitioner's common sense conviction that the issues raised herein will never be heard on the merits by the existing New Jersey Supreme Court for the following reasons: six of the seven now sitting justices, including the chief justice, lack tenure and must be reconfirmed by the Senate seven years after their elevation to the high court. Their tenure rests on the good will of the men who wrote and enacted *N.J.S.A.* 19:49-2 and *N.J.S.A.* 19:13-20.

Furthermore, three of the justices are former Attorney Generals who were also charged with executing the election laws that are the raison d'être of this matter. Justice Veniero was the Attorney General when both of the cases joined in this matter were brought to trial. He defended Respondent County Clerk in both the 1997 and 1998 cases and then sat on the New Jersey Supreme Court panel which denied the Petitioner certification. Justice Long denied the motion for emergent relief at the appellate level and upon elevation to Supreme Court, sat on the panel which denied this matter certification. Chief Justice Poritz is also a former Attorney General and she issued the decision denying certification.

Although the granting of accelerated process and emergent relief is discretionary with the New Jersey courts, in 1998 Petitioner sought both at all times, at each judicial level. It was granted at the trial level but expressly denied at the appellate level and by the New Jersey Supreme Court. In

effect by denying emergent relief, the courts forced Petitioner to follow the slow route to this Court. By denying accelerated process, the New Jersey courts dealt the Petitioner two devastating blows: 1) Petitioner's claims could not heard on their merits before the General Election, and 2) Petitioner's claims were forced into a technically "moot" characterization.

The following timeline demonstrates the *pro se* Petitioner's good faith attempt to obtain relief prior to the General Election:

- In her *first case*, on August 18, 1997, more than two months before the general election, Petitioner filed her appeal.
- In her *second case*, the 1998 Primary Election was held June 2.
- Petitioner filed a verified pro se complaint on June 8, 1998, six days after losing the primary election.
- Trial Court issued final order dismissing the case on July 30, 1998.
- Petitioner filed an application and brief for acceleration and emergent relief on August 12.
- New Jersey Supreme Court denied the "motion to accelerate and further relief" on August 19.
- On August 24, Petitioner filed a Motion for Leave to Appeal Appellate Division Denial of Request for Emergent Relief which raised *inter alia*, the following two issues:

POINT I WITHOUT THE EMERGENT ACTION OF THIS COURT AND THE RELIEF REQUESTED IN HER MOTION, THE MOVANT WILL BE UNABLE TO MEET THE TIME DEADLINES NECESSARY TO RUN IN THE GENERAL ELECTION AND SIMILARLY SITUATED CANDIDATES WILL CONTINUE TO BE INJURED, NOW AND IN THE FUTURE.

POINT V *N.J.S.A.* 19:49-2 IS UNCONSTITUTIONAL AS WRITTEN AND APPLIED AND THE STATE FAILED TO DEMONSTRATE A COMPELLING STATE INTEREST TO UPHOLD ITS CONSTITUTIONAL VALIDITY. (See Brief Lodged as A, Supporting Request for Emergent Relief before N.J. Supreme Court).

The Supreme Court refused to grant emergent relief by order dated September 2, 1998, forcing the Petitioner to file a regular appeal, utilizing the normal, slow appellate process which was finally heard and a decision rendered by the appellate court on October 6, 1999. *It should be noted well that all this time, the 1997 election case languished before the appellate court which waited to join the 1998 case into a single matter that is now before this Court.* The New Jersey Supreme Court denied certification on March 7, 2000, giving rise to this Petition.

Petitioner argues to this Court that the courts below are using mootness as an excuse for their failure to reach the Constitutional merits of issues presented by these two joined cases and that they should not be allowed to escape the scrutiny of this Court by opining a mootness that they themselves created! To deny this Petition would be to deny fundamental fairness. Petitioner submits to this Court that the courts below used artifice so that they do not have to decide politically unsavory issues -- issues that carry with them the potential to injure the jurists that decide them, and by deciding them, subject them to public and political scrutiny.

POINT IV ELECTION LAWS WHICH DESTROY THE INTEGRITY OF THE ELECTORAL PROCESS, DISENFRANCHISE VOTERS, AND WEAKEN POLITICAL PARTIES ARE OF SUCH IMPORTANCE THAT THIS COURT SHOULD GRANT PETITIONER'S WRIT.

N.J.S.A. 19:13-20 disenfranchises voters. In the case of a tie vote in a municipal primary election, this statute mandates that a few members of a municipal political party decide who will represent the party in the general election. It does not provide for due process or a forum wherein the candidates can plead their candidacy before the committee. In 1997, Petitioner and her opponent for a council seat each received 150 votes. The tie was broken in a closed meeting attended by her opponent who was a member of the committee. The Petitioner was not notified of the meeting or invited to attend. Her opponent was elected winner of the Primary Election by his fellow committee members.

It is submitted that this statute is unconstitutional on its face inasmuch as it deprives registered voters the opportunity to elect who they wish to represent the party in the General Election. (See Point II of Petition, p. 14). It is a perfect example of a statute that promotes voter apathy. Indeed why should a voter cast a vote if his vote can be so cavalierly discarded?

N.J.S.A. 19:49-2 was designed to give the political party hierarchies the power to control who will be party candidates in primary elections -- and thus on the party's ticket in the General Election. In certain New Jersey counties where one political party dominates, winning the party's nomination in the primary guarantees a candidate will win the General Election.

N.J.S.A. 19:49-2 is discriminatory. It gives one individual in each county, i.e., the county campaign manager, uninhibited power. The campaign manager is appointed by candidates running for county office. He is not elected by registered party voters. Once appointed the campaign manager (who is invariably the County Party Chairman), has the power to grant or withhold the party slogan and the party preferred

column position on the ballot -- which in effect acts as a party endorsement and promulgates the discriminatory practice of creating second class party candidates. These second class candidates are powerless to appeal their classification since they are not provided a hearing or forum. In application, this statute operates as the political party's tool of exclusion rather than association.

Petitioner submits that this statute denies equal protection, procedural due process, right to associate, and deprives candidates of valuable property. (See Point III of Petition, p. 17).

In conclusion, the Petitioner submits that *N.J.S.A.* 19:49-2 and *N.J.S.A.* 19:13-20 pervert the very essence of the Federal Constitution. They should be stuck down by this Court inasmuch as they allow the government that was created "by people and for the people" to evolve into one that is controlled *by the party hierarchy for the party hierarchy.*

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: September 10, 2000

APPENDICES

APPENDIX A

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
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124 HALSEY STREET
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Christine Todd Whitman
Governor

John J. Farmer, Jr.
Attorney General

Jeffrey J. Miller
Assistant Attorney General
Director

June 21, 2000

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street N.E.
Washington D.C. 20543

Re: Diane Sank v. State of New Jersey et al.
Docket No. 99-1984

Dear Mr. Suter:

The State of New Jersey waives its right to file a brief on behalf of the Bergen County Superintendent of Elections and the Bergen County Board of Elections in opposition to the petition for a writ of certiorari in the above entitled matter. However, if the Court requests that a brief be filed, the Attorney General will file a brief.

The within appeal is from the dismissal of petitioner's complaint challenging the nomination of other persons as the Republican candidates for Councilperson in Englewood Cliffs, New Jersey in 1997 and 1998 primaries. The Appellate Division of New Jersey dismissed the matter as moot in that the general election had been held and the successful candidates sworn in advance of the appeal being perfected and heard (Appendix B to Petition for a Writ of Certiorari); thereafter, the New Jersey Supreme Court denied certification (Appendix A to Petition for a Writ of Certiorari). In affirming the dismissal of the matter, the Appellate Division stated that "[a]lthough this court may decide

[p.2]

moot controversies where issues of great importance are presented...we see no reason to invoke this power in the present case." (Appendix B at 8a).

Respectfully submitted

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By : /Andrea M. Silkowitz/

Andrea M. Silkowitz
Assistant Attorney General

cc: Diane Sank, pro se
John Carbone, Esq.
Stephen P. Sinisi, Esq.

APPENDIX B

SINISI & SPROVIERO
COUNSELLORS AT LAW

STEPHEN P. SINSI
SCOTT O. SPROVIERO

TWO SEARS DRIVE
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RALPH W. SOUKIS
OF COUNCIL
MEMBER N.J. BAR

June 29, 2000

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Re: Diane Sank v. State of New Jersey
Docket No. 99-1984

Dear Mr. Suter:

Please be advised that the undersigned represents Henry Shotmeyer, individually and in his capacity as Chairman of the Bergen County Republican Organization, in the above-entitled matter.

On our client's behalf, we acknowledge receipt of a copy of correspondence dated June 21, 2000, submitted to the Court from Andrea M. Silkowitz, Assistant Attorney General of the State of New Jersey, representing the Bergen County Superintendent of Elections and the Board of Elections, respectively.

For substantially the reasons expressed in Ms. Silkowitz's correspondence, we agree with the position set forth therein and will file no brief unless requested by the Court.

I hereby certify that I am a member in good standing of the Bar of the Supreme Court of the United States, having been admitted October 2, 1978.

Respectfully submitted,

SINISI & SPROVIERO

By /Stephen P. Sinisi/
Stephen P. Sinisi

SPS:rk

cc: Diane Sank
Henry Shotmeyer
John M. Carbone, Esq.
Andrea M. Silkowitz, Esq., AAG